No. 13-

IN THE

Supreme Court of the United States

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC, *et al.*,

Petitioners,

v.

KAMALA D. HARRIS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause allows California to impose a complete ban on the sale of wholesome, USDA-approved poultry products from other States and countries — in this case, *foie gras* — based solely on the agricultural methods used by out-of-state farmers who raise their animals entirely beyond California's borders.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Petitioners are Association des Éleveurs de Canards et d'Oies du Québec, HVFG LLC, and Hot's Restaurant Group, Inc.

Association des Éleveurs de Canards et d'Oies du Québec (Canadian Farmers) is a Canadian non-profit corporation representing the interests of duck and goose farmers who export their USDA-inspected products to the United States. The Canadian Farmers have no parent corporation, and no publicly held company has a 10% or greater ownership interest in the Canadian Farmers.

HVFG LLC, which is known as Hudson Valley Foie Gras (Hudson Valley), is a New York limited liability company. Hudson Valley has no parent corporation, and no publicly held company has a 10% or greater ownership interest in Hudson Valley.

Hot's Restaurant Group, Inc. (Hot's Kitchen), is a California corporation that operates a restaurant called Hot's Kitchen. Hot's Kitchen has no parent corporation, and no publicly held company has a 10% or greater ownership interest in Hot's Kitchen.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Association des Éleveurs de Canards et d'Oies du Québec, HVFG LLC, and Hot's Restaurant Group, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's published opinion is reported at 729 F.3d 937 and is reprinted in the Appendix (App.) at 1–31. The Ninth Circuit's order denying rehearing *en banc* is reprinted at App. 63–64. The order of the district court is reprinted at App. 32–62.

JURISDICTION

The Ninth Circuit filed its opinion on August 30, 2013. App. 1. It denied Petitioners' timely petition for rehearing *en banc* on January 27, 2014. App. 63. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, sec. 8, cl. 3, provides:

> The Congress shall have the power ... [t]o regulate Commerce with foreign nations, and among the several States[.]

The statute that Petitioners challenge here provides in relevant part as follows:

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

Cal. Health & Safety Code § 25982.

> Force feeding a bird means 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(b). These and the related California statutes involved are reprinted at App. 65–67.

INTRODUCTION

In the name of foisting its own notion of animal welfare on farmers in *other* States and countries, the California Legislature has run roughshod over the principles of federalism and free trade in America. With the Ninth Circuit's recent blessing, California now bans the sale of USDA-approved, wholesome, unadulterated poultry products — in this case, foie gras — based *solely* on the agricultural methods used by out-of-state farmers in feeding their livestock. Petitioners Hudson Valley and the Canadian Farmers raise their ducks entirely in Canada and New York and in full compliance with both

federal and local law. But, under the ruling below, they are now prohibited from selling their foie gras products in California if they feed their animals "more food" than whatever California arbitrarily dictates as the limit for its own ducks.

Yet, as this Court has explained in decisions spanning the decades from *Baldwin* to *Healy*, the Constitution does not tolerate this kind of extraterritorial regulation. In "open defiance" of this Court's precedents, the Ninth Circuit tells Petitioners that — based solely on the way they hand-feed their ducks in Quebec and Sullivan County — the California Legislature may block their federally-inspected products from being sold in California. The Ninth Circuit then sends Petitioners away with this unconstitutional consolation: "Plaintiffs may force feed birds to produce foie gras for *non-California markets*." App. 25 (emphasis added).

Under this Court's Commerce Clause jurisprudence, California has no business telling farmers beyond its borders how to feed their ducks on pain of being denied access to the State's 38 million consumers. Nor may California use its market power as the nation's largest economy to boycott the products of out-of-state producers who use modern methods that California has needlessly chosen to forbid its own farmers from using. As Justice Jackson eloquently put it:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that … no foreign state will by

> customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.
>
> Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

Unless this Court grants review, California and the Ninth Circuit will have set a dangerous precedent for erecting trade barriers between the States. That the statute at issue — a complete ban on a wholesome, USDA-approved food product — is based on a trend of altruistic concern for the welfare of animals in *other* States and countries does not make it any less unconstitutional. "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994).

With apologies to Martin Niemöller, "First they came for the foie gras . . ." Today, California believes it can ban millions of dollars in commerce from out-of-state farmers whose ducks are fed "more food" than the California Legislature allows its own farmers to feed. Starting in 2015, California believes it can ban literally billions of eggs from out-of-state ranchers whose hens are given "less space" than California requires for its own. Without intervention from this Court, there will be nothing to stop California or any other similarly-inclined States from

dictating the methods of production to be used by out-of-state producers of even the most innocuous product as a condition to allowing its sale. Whether it is the largest State or the smallest that walls itself off in this way, it is our entire economic union that will suffer.

STATEMENT OF THE CASE

A. California Bans Poultry Farmers' Use of a Well-Established Agricultural Practice

As defined under federal law, foie gras is goose or duck liver "obtained exclusively from specially fed and fattened geese and ducks." App. 24–25. No State in America bans the sale of foie gras. Nor does any other country (though a handful ban its production). Even California does not ban the sale of foie gras per se.

In 2004, at the urging of celebrities such as Alicia Silverstone, the California Legislature passed a bill sponsored by animal rights activists to ban the millennia-old practice of "force feeding" ducks and geese for the purpose of enlarging their livers. The bill's author contended that the process used in producing foie gras was "hard on" the ducks. Meanwhile, California's own Department of Food and Agriculture — the agency most familiar with foie gras production in the State — formally reported that "Production of Foi[e] Gras in California does not involve cruelty at any time" and that "Foi[e] Gras production is a food production industry well established in conformity with humane animal management, safe food practices and environmentally protective provisions of State and Federal law."

California Senate Bill 1520 added sections 25980 through 25984 to the California Health and Safety Code. App. 65–67. Section 25981 makes it a violation for a person to "force feed a bird for the purpose of enlarging the bird's liver beyond normal size, or [to] hire another person to do so." App. 65. Under section 25980(a), "[a] bird includes, but is not limited to, a duck or goose." App. 65. Petitioners do not feed any ducks or geese in California and do not challenge the application of Section 25981 to farmers in California.

Section 25980(b) defines "force feeding" as "a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily." App. 65. It continues: "Force feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into the bird's esophagus." App. 65. Respondent, the California Attorney General charged with enforcing the law, interprets these statutes to mean: "Farmers are not prohibited from leaving out more food than usual for a particularly hungry duck."[1]

Unlike Section 25981, Section 25982 goes beyond banning a particular agricultural practice in California. It prohibits the sale of any resulting product depending on how much and for what purpose the duck or goose was fed. Section 25982 states in its entirety: "A product may not be

1. The use of a tube to feed ducks large quantities of food is the only method known to Petitioners today for producing foie gras. This practice, known as *gavage*, has been used for thousands of years, from slaves in ancient Egypt to Pliny the Elder, and is enshrined in French law as the definitive method for creating this vital part of France's "protected cultural and gastronomic heritage." Pliny the Elder, *Naturalis Historia,* Book 10, Ch. 27 (A.D. 77) *Code Rural* of France, Art. L654-27-1.

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." App. 65. Section 25983(b) prescribes (unlimited) penalties of $1,000 per sale per day. App. 66.

California has repeatedly emphasized that the statutory scheme here — which does not even mention foie gras — did not seek to ban foie gras. In his signing message, then Governor Arnold Schwarzenegger wrote to the Senate, "This bill's intent is to ban the current foie gras production practice . . . It does not ban the food product, foie gras." Respondent herself has also taken the position that "Section 25982 does not even prohibit all foie gras sales, but only sales of foie gras produced by force feeding." Indeed, the Ninth Circuit has recently declared in this case that Section 25982 "bans the sale of foie gras produced through force feeding, but would not ban foie gras produced through alternative methods." App. 13.

Despite the California Legislature's purported interest in preventing animal cruelty, it curiously delayed the effective date of the law until July 1, 2012 — a delay of nearly eight years. Section 25984 explains why. It was "the express intention of the Legislature, by delaying the operative date … to allow a seven and one-half year period for persons or entities engaged in agricultural practices that include raising and selling force fed birds to *modify their business practices*" (emphasis added). Because Section 25981 prohibited force feeding within California as of July 1, 2012, the one farmer of ducks raised for their livers within the State — who had negotiated this grace period with the bill's author to allow himself enough time to reach retirement age — closed down his farming operations as of that date.

The Canadian Farmers are an association of all of the Canadian Farmers in Quebec who raise and process ducks for import to the United States. Hudson Valley is a New York duck farm that is America's largest producer of foie gras. And Hot's Kitchen is a California restaurant that, until Section 25982 went into effect, sold foie gras without fear of prosecution. Hudson Valley and the Canadian Farmers go to great lengths to ensure the welfare of their animals. They are governed by strict laws against animal cruelty in their own state and province. N.Y. Agric. & Markets Law § 353; Criminal Code of Canada, R.S.C. 1985, c. C-46 § 445.1.

The ducks on Petitioners' farms are given *ad libitum* access to specially formulated feed from the time they arrive as one-day-old ducklings until they reach maturity. Starting around their eleventh week, the farmers restrict the availability of this food to limited periods during the day so that the ducks gorge the way they would in the wild. In their last 10 to 21 days before slaughter, the farmers use a tube two to three times a day — for anywhere between two and ten seconds — to deposit a pre-measured serving of food at the base of the duck's esophagus for the animal to digest in due course.[2] The feeding method used by the Canadian farmers and Hudson Valley enables them to maximize the economic value from the duck.

Neither SB 1520 nor its legislative history reveals an intent to reach the feeding of ducks outside California. Even Respondent took the position below that Section

2. In other words, the feedings last a cumulative total of not more than a few minutes, or as little as 0.0007% of the ducks' 14- to 16-week lives.

25982 "merely reinforces the in-state production ban by removing the incentive for in-state producers to force feed birds in contravention of the ban," thus ensuring that "[i]n-state producers are doubly barred from producing and selling." Nevertheless, the Ninth Circuit and the district court below construed Section 25982 to make it illegal for an out-of-state farmer to sell his duck products in California if — back home on the East Coast, for example — he feeds his ducks "more food than a typical bird of the same species would consume voluntarily."

B. Proceedings Below

On July 2, 2012, the first court day that the statute was in effect, Petitioners filed this action and promptly sought both a temporary restraining order and preliminary injunction against the enforcement of Section 25982 on the ground that it is unconstitutional as applied to the sale of products that result from Petitioners' activities entirely outside California. As their evidence established, in the time that Section 25982 has been in effect, Petitioners alone have lost well over $5 million in sales of wholesale foie gras, to say nothing of the tens of millions of dollars in lost commerce among distributors and restaurants. The district court recognized the significance of these unrecoverable losses in finding that Petitioners are continuing to suffer irreparable harm.

The district court nevertheless refused to issue a preliminary injunction because it believed that Petitioners raised no serious questions about the constitutionality of Section 25982 as applied to the sale of their products from ducks fed entirely outside California. On the issue of the statute's extraterritorial effect, the district court

felt that Petitioners had called for an unduly "expansive interpretation" of the extraterritoriality doctrine. "For example," the district court reasoned, "it would require courts to strike down a growing number of state laws that prohibit the manufacture, sale, or distribution of bottles or cups that contain bisphenol-A, a suspected carcinogen." App. 56. This of course ignores the distinction between, on the one hand, a State's undisputed regulatory power to ban the sale of a carcinogenic product based on the harmful effects it has on human beings *within* the regulating State and, on the other, a State's impermissible attempt to ban the sale of a wholesome product based on the perceived effects it has on animals *entirely outside* the regulating State.[3]

The district court ordered the proceedings stayed pending the outcome of Petitioners' appeal to the Ninth Circuit. On August 30, 2013, the Ninth Circuit affirmed the district court's denial of Petitioners' motion for a preliminary injunction. The Ninth Circuit started by simply assuming that Section 25982 was intended to ban the sale of wholesome foie gras products "regardless of where the force feeding occurred." App. 22. "Otherwise," the Court remarkably concluded, "California entities

3. Of course any product regulation may have the incidental effect of influencing producers anywhere in the world to alter their production practices if they wish to sell in the local market. The district court's bisphenol-A example is one such example, at least to the extent it requires out-of-state producers to ensure that the substance is removed from bottles or cups sold in California. But Section 25982 is a different animal. Its *only* condition for the sale of USDA-approved duck products from outside the State is that the ducks not be fed in a way that California denounces. That is a quintessential example of extraterritorial regulation.

could obtain foie gras produced out-of-state and sell it in California." App. 22.

In affirming the district court's order, the Ninth Circuit held that the Commerce Clause allows California to ban wholesome, USDA-certified poultry products from other States and countries — including, here, our NAFTA trading partner, Canada — if the farmers in those places use production methods that the California Legislature forbids to its own. Ignoring Congress's intent that commerce in USDA-approved poultry products such as foie gras be regulated at the federal level in order "to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers," 28 U.S.C. § 451, the Ninth Circuit sent Petitioners away with this unconstitutional consolation: "Plaintiffs may force feed birds to produce foie gras for *non-California* markets." App. 25 (emphasis added).

Contrary to this Court's command in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989) — which held that the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State," *id.* at 336 — the Ninth Circuit never directly addressed the "practical effect" of Section 25982 as applied to Petitioners' out-of-state ducks, which is to condition access to the enormous California market for poultry products on feeding practices that take place wholly outside the State.

On September 23, 2013, Petitioners timely sought rehearing *en banc*. Nine days later, the plaintiffs in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d. 1070 (9th

Cir. 2013), a case raising the same extraterritoriality issue under the Commerce Clause — i.e., the power of a State to restrict interstate and foreign commerce based on the production methods used by farmers beyond its borders — sought *en banc* review of the Ninth Circuit's opinion in that case. Petitioners notified the court of the common issue and requested that, if review was granted in the *Rocky Mountain* case, it should also (and *a fortiori*) be granted in ours "to ensure full and consistent consideration of this foundational issue of federalism under the Constitution." The Ninth Circuit took the unusual step of ordering the Attorney General to submit responses to both petitions for rehearing *en banc*.

No doubt in recognition of this overlapping issue, the court delayed ruling on Petitioners' request for *en banc* review until just days after it issued its denial of rehearing *en banc* in the *Rocky Mountain* case. On January 22, 2014, the Ninth Circuit denied *en banc* review in the *Rocky Mountain* case. In their petition for a writ of certiorari filed just weeks ago in Case Nos. 13-1148 and 13-1149, the petitioners in *Rocky Mountain* include multiple citations to the Ninth Circuit's published opinion in our case. As noted in the petition, "The Ninth Circuit has now blessed California legislation barring or penalizing imports based on their mode of production in other States — not only in this case, but at least once more." Pet. RMFU 22.

As the *Rocky Mountain* petitioners aptly observed:

> California alone has already enacted potentially extraterritorial legislation related to methods of production of foods ultimately sold in

> California. *See Association des Eleveurs*, 729 F.3d 937 (foie gras); *see also* Cal. Health & Safety Code § 25996 (eggs). There is no telling what might come next, in California or elsewhere, now that the practice has received the Ninth Circuit's approval.

Id. "By the same logic, a State with California's market power could adopt any number of policies on virtually any social and economic policy issue." *Id.* at 34.

Certiorari is necessary to bring California's laws — and the Ninth Circuit's opinion — into line with this Court's precedents and to delineate how far State legislatures (and lower courts) may go in seeking to control the production methods used by out-of-state producers.

REASONS FOR GRANTING THE PETITION

This case presents a question of exceptional national importance: Does the Commerce Clause allow a State to ban the sale of wholesome, USDA-approved food products that come from other States and countries — where the ban is *not* based on any concern for the health or safety of its people, or even for the welfare of any animals within the State, but based solely on the State's disfavor of the agricultural practices used by farmers beyond its borders?

In answering that question in the affirmative, the Ninth Circuit's opinion defies countless pronouncements of this Court emphasizing that, in the free trade area known as the United States, a State may not burden — let alone ban — the sale of wholesome products from other States merely to assuage the political will of its citizens. Indeed,

just two years ago, this Court unanimously reversed the Ninth Circuit on related preemption grounds in a case involving "downer" pigs, flatly rejecting the notion that "states are free to decide which animals may be turned into meat." *Nat'l Meat Ass'n v. Harris*, 132 S.Ct. 965, 973 (2012) ("We think not.").

Review by this Court is necessary today to correct the constitutional errors in the Ninth Circuit's opinion that will otherwise validate unprecedented barriers to interstate and foreign commerce. And because Petitioners produce wholesome food products from animals that are bred, fed, slaughtered, and turned into meat entirely beyond California's borders, this case presents an ideal vehicle for addressing this foundational constitutional issue.

I. IN UPHOLDING CALIFORNIA'S BAN ON WHOLESOME PRODUCTS FROM OUT-OF-STATE FARMERS WHO USE A SUPERIOR AGRICULTURAL METHOD, THE NINTH CIRCUIT'S OPINION STANDS IN OPEN CONFLICT WITH THE DECISIONS OF THIS COURT DECLARING THAT SUCH EXTRATERRITORIAL REGULATION VIOLATES THE COMMERCE CLAUSE.

The Constitution gives to Congress — not California — the power "[t]o regulate Commerce with foreign Nations, and *among* the several States." U.S. Const. art. I, § 8, cl. 3 (emphasis added). "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *S.–Cent. Timber Dev., Inc. v.*

Wunnicke, 467 U.S. 82, 87 (1984). The Commerce Clause thus limits the power of States "to erect barriers against interstate trade." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980).

Here, the Ninth Circuit held that the Commerce Clause allows California not only to ban the sale of wholesome, USDA-approved products from ducks raised by California farmers — most notably in this case, foie gras — but also to condition access to its market on *out-of-state* farmers' changing the way *they* treat their livestock back in Canada and New York. In doing so, the Ninth Circuit upholds an unprecedented restriction on commerce under the guise of a State's purported interest in preventing "complicity" in what it perceives to be cruelty to animals — animals that, like Petitioners' ducks here, are raised to be turned into meat entirely in *other* States and countries.

From long before Justice Jackson wrote that the Commerce Clause ensures that "every farmer … shall be encouraged to produce by the certainty that he will have free access to every market in the Nation," and in countless cases since, this Court has made clear that one State may not boycott others' products except to protect the health or safety of its citizens or the preservation of its natural resources. Yet the Ninth Circuit's opinion here paid lip service to these cases and went out of its way to avoid the application of these foundational principles.

Over 100 years ago, in *Schollenberger v. Com. of Pa.*, 171 U.S. 1 (1898) — a decision that remains binding to this day — this Court struck down a state ban on the sale of oleomargarine. "If [C]ongress has affirmatively pronounced the article to be a proper subject of commerce,

we should rightly be influenced by that declaration." *Id.* at 8. Congress had provided for the inspection and labeling of oleomargarine, *id.* at 8-9, just as it has done for duck products through the Poultry Products Inspection Act here. This Court went on hold, "[W]e yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated, and which in its pure state is healthful." *Id.* at 14.

Here, if interpreted to apply to the farmer Petitioners (as the Ninth Circuit concluded), Section 25982 effectively operates as an absolute ban on a poultry product — foie gras — that Congress declares to be in interstate commerce and that the USDA inspects and approves as wholesome and unadulterated. (Contrary to what the Ninth Circuit imagined, the record contains no evidence that there is any known method of producing foie gras other than the method described in the farmer Petitioners' declarations, which the court construed to fall within the proscription of section 25980(b).)

"The Court has often described the Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation." *Dennis v. Higgins*, 498 U.S. 439, 448 (1991). Moreover, "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994). The Ninth Circuit itself had previously recognized the critical function of the Commerce Clause. "The chief purpose underlying [the Commerce] Clause is to limit the power of the States to erect barriers against interstate trade. The intent is to promote a national market and the free flow of goods and services through the several states; it

is the economic interest in being free from trade barriers that the clause protects." *Yakima Valley Memorial Hosp. v. Washington State Dept. of Health*, 654 F.3d 919, 932 (9th Cir. 2011) (internal quotations/citations omitted). Yet the Ninth Circuit's opinion in our case turned the pronouncements of this Court into mere platitudes.

Regardless of how grandiose California's aims may be, the Commerce Clause — which reserves matters of interstate and foreign commerce to Congress — does not allow this form of extraterritorial regulation. One State "may not insist that producers in other States surrender whatever competitive advantages they may possess." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 580 (1986). In spite of this basic principle of federalism, the Ninth Circuit here had no qualms about a statute that now forces New York and Canadian farmers to give up a millennia-old but highly modernized feeding method as a condition to the sale of their wholesome, USDA-inspected poultry products in California. The panel's presiding judge mused aloud at oral argument, "Well, we're cruel[] to the cattle that we slaughter here, aren't we . . . and chickens . . . that never see the light of day?" (*See* http://cdn.ca9.uscourts.gov/datastore/media/2013/05/08/12-56822.wma [audio file] at 20:18.)

But when one State tries to dictate the production methods to be used by farmers in other States as a condition to the sale of their products, the constitutionality of that law should not depend on the desires of any particular jurist. The Ninth Circuit knows this well. "The Commerce Clause … was included in the Constitution to prevent state governments from imposing burdens on

unrepresented out-of state interests merely to assuage the political will of the state's represented citizens." *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 998 (9th Cir. 2002). California may forbid its own farmers from using an established feeding technique, however unwise that local policy decision may be. But California cannot then seek to "level the playing field" by depriving out-of-state farmers of the competitive advantage they retain in maximizing the economic value from their livestock.[4]

As this Court has explained, "The Commerce Clause … precludes the application of a state statute to commerce

4. Indeed, to reach the result it did, the Ninth Circuit had to ignore its own precedent on this issue. In *Nat'l Audubon Society v. Davis*, 307 F.3d 835, 842 (9th Cir. 2002), the Ninth Circuit upheld a California statute aimed at preventing cruelty to animals trapped for their fur. As the California Legislature sought to do here with products that result from force-feeding a bird, the statute in *Audubon* not only banned the use of steel-jawed leghold traps but went further in also banning the sale of fur from any animal trapped using what the court referred to as such "inhumane traps." *Id.* at n.3. The National Trappers Association challenged the law on the grounds that it "directly regulates and discriminates against interstate commerce," but the Ninth Circuit was able to recognize that it did no such thing. Id. at 857. As the court explained:

> A plain reading of § 3003.1(b) limits its application to furs from animals *trapped inside California; it does not apply to furs from animals trapped outside the state*. … That is, trappers acquiring furs *outside of California* by means of leghold traps face *no restriction on selling such furs in California*.

Id. (emphasis added). The Ninth Circuit held that such a statute did not violate the Commerce Clause precisely because — unlike the statute at issue here — the ban on the sale of furs was limited to furs from animals that had been *trapped within California*.

that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989); *see also Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down statute that imposed penalty on bidder for state government contracts if bidder did business with Burma "because both the intention and effect of the statute [was] to change conduct beyond Massachusetts's borders"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (holding that one State "may not impose economic sanctions ... with the intent of changing ... lawful conduct in other States").[5]

This Court made it abundantly clear in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), that what California has done here, with license from the Ninth Circuit, does not pass muster under the Constitution. "It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale

5. Respondent and the Ninth Circuit dismiss the significance of *Baldwin*, *Brown-Foreman*, and *Healy* by noting that each case involved a State's attempt to use its market power to dictate the prices at which goods could be sold in other States. App. 26. They then point to *Pharm. Research & Mfrs. of America v. Walsh*, 538 U.S. 644 (2003), as somehow limiting the Commerce Clause's prohibition on extraterritorial regulation to the pricing context. App. 26. But a fair reading of *Walsh*, which happened to not involve prices, shows that this Court said no such thing. In any event, from the standpoint of an economic actor's competitive advantage, there is no meaningful difference between an extraterritorial regulation of the price at which a product is sold and an extraterritorial regulation of the methods by which it is produced.

of prices for use in other states, and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed." *Id.* at 528.

For exactly the same reasons, Justice Cardozo's holding in *Baldwin* renders section 25982 unconstitutional here. If the Commerce Clause does not permit California to bar the sale of products from people who were not paid wages that California deems to be "enough," then it certainly does not permit California to bar the sale of products from ducks that were fed more food than California deems to be "enough." The Ninth Circuit's opinion to the contrary cries out for reversal.

* * *

In their dissent from the denial of *en banc* review in the *Rocky Mountain* case, seven judges on the Ninth Circuit got it right when they wrote, "Now, the dormant Commerce Clause has been rendered toothless in our circuit, and we stand in open defiance of controlling Supreme Court precedent." *Rocky Mountain*, 740 F.3d 507, 519 (9th Cir. 2014).[6]

6. The Ninth Circuit also erred in its analysis of Section 25982 under the balancing test this Court established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which examines whether a substantial burden on interstate commerce is outweighed by a legitimate local interest. Here, as nice as it may be for the California Legislature to care about the comfort of ducks raised for food in New York and Canada — where they are already protected by strict laws against animal cruelty — that is hardly a legitimate interest *or* a local one. *See Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) ("While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders.").

II. IMMEDIATE REVIEW IS NECESSARY BECAUSE, IF LEFT TO STAND, THE NINTH CIRCUIT'S OPINION WILL CONTINUE TO DESTROY THE INTERSTATE MARKET IN PETITIONERS' WHOLESOME POULTRY PRODUCTS — AND WILL SPOIL THE FREE TRADE AREA THAT IS THE UNITED STATES

Petitioners' ducks are the proverbial canaries in the coal mine. If the Ninth Circuit's opinion is not reversed by this Court, it will serve as a license for California to wall off its market of 38 million consumers to even the most wholesome, delicious, or life-saving commerce from outside the State whenever the California Legislature decides it disapproves of the way something is produced. Indeed, the same flawed reasoning by which the Ninth Circuit would uphold a ban on a particular poultry product such as foie gras — based on a perception of how a duck in Canada or New York might feel — would also justify a state or local ban on products from out-of-state chickens slaughtered without having first been stunned (i.e., a method used to render them kosher or halal). Or a ban on any USDA-approved dairy products from out-of-state cows that were milked "too much." Or, as California is poised to implement on January 1, 2015, a ban on USDA-approved eggs from out-of-state hens that did not have "as much" room in their cages as California dictates. Cal. Health & Safety Code § 25996. Or perhaps even a ban on FDA-approved cosmetics or prescription drugs that are "the result of" testing on out-of-state animals.

Can California — consistent with the Commerce Clause — completely ban the sale of poultry products like foie gras from Hudson Valley and farmers in Quebec in

the hope of reducing any imagined discomfort felt (if at all) thousands of miles away by ducks in New York and Canada? Do the States now have to negotiate free trade agreements with each other to provide for the unburdened movement in interstate commerce of each other's goods? (And didn't Canada already do that when it signed the NAFTA with the United States — i.e., with all 50 states?) Or was this all not put in place in 1789 when the Commerce Clause was included in the Constitution and this nation created the most industrious free trade area in the history of mankind.

If the Ninth Circuit is not directed to adhere to this Court's jurisprudence on the limits of State-on-State regulation, then its published opinion in this case will serve as a green-light for untold extraterritorial overreaching. This Court should halt that train before it gets any farther out of the station.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THIS FOUNDATIONAL CONSTITUTIONAL ISSUE

The Ninth Circuit's "open defiance" of this Court's precedents is perhaps understandable in the context of this Court's own description of its "negative" or "dormant" Commerce Clause jurisprudence as a "quagmire." *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 612 n.3 (1997) (Thomas, J.) (citing cases also referring to its "cloudy waters" and "tangled underbrush"). Indeed, quoting Justice Scalia, the district court defaulted to this very description. App. 50. But there is no reason for this Court to leave the rest of the judiciary in doubt about the vitality of its precedents upholding a doctrine that forbids one State from projecting its regulatory regime into another.

This case offers the Court the best vehicle to light the way for lower courts and legislatures. Measured in dollars alone (as opposed to man's culinary pleasure), there are certainly larger economic markets than that for foie gras. But this case provides a superior opportunity for this Court to squarely address the Constitution's limits on the authority of one State to impose its political will on producers in other States. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (striking statute that conditioned sale of milk in New York based on price paid to producers outside the state because "New York has no power to project its legislation into Vermont"). There are at least four compelling reasons why the Court should grant the petition in this case.

First, while other restrictions still allow for products to be sold in the regulating State, *e.g.*, *Natsios*, the restriction here is a more direct burden on commerce because it operates as a *total ban* on the sale of wholesome poultry products from Canada and New York if the animals were fed in a way that California frowns upon. *Second*, the ban on poultry products in this case is based *solely* on the farming method used by agricultural producers in other states and countries. *Third*, this case involves the attempted regulation of products in the American food supply — and, in particular, a ban on federally-approved poultry products that are inspected by the USDA and deemed fit for distribution in interstate commerce. Foie gras itself is one such product, but such laws could just as readily be applied to the nine billion chickens slaughtered annually in the United States for human consumption. And finally, there is no question that Petitioners' ducks are all bred, fed, slaughtered, and turned into poultry commodities *entirely* outside California. California simply

has no legitimate local interest in telling New York and Canadian farmers how to raise their animals — especially when the farmers are subject to strict laws against animal cruelty in their own state and province.

* * *

The time to emphasize that this Court meant what it said in *Schollenberger*, *Baldwin*, *Brown-Foreman*, and *Healy* is now, *before* the Ninth Circuit's opinion in this case leads other courts and State legislatures to further defy this Court's sound precedents.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATION DES ELEVEURS DE CANARDS ET D'OIES DU QUEBEC, a Canadian nonprofit corporation; HVFG, LLC, a New York limited liability company; HOTS RESTAURANT GROUP. INC., a California corporation, *Plaintiffs-Appellants*, and GAUGE OUTFITTERS, INC., *Plaintiff*, v. KAMALA D. HARRIS, Attorney General; EDMUND G. BROWN, in his official capacity as Governor of California; THE STATE OF CALIFORNIA, *Defendants-Appellees*.	No. 12-56822 D.C. No. 2:12-cv-05735-SVW-RZ OPINION

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

Argued and Submitted
May 8, 2013 – Pasadena, California

Filed August 30, 2013

Before: Harry Pregerson and Raymond C. Fisher, Circuit Judges, and Wiley Y. Daniel, Senior District Judge.*

Opinion by Judge Pregerson

SUMMARY**

Civil Rights

The panel affirmed the district court's denial of a motion to preliminarily enjoin the State of California from enforcing California Health & Safety Code § 25982, which bans the sale of products that are the result of force feeding birds to enlarge their livers beyond normal size.

The panel affirmed the district court's denial of Eleventh Amendment immunity to the Attorney General. The panel dismissed the State of California and Governor Brown from the lawsuit because they were immune from suit.

The panel held that the only product covered by § 25982 at issue in this appeal was foie gras, a delicacy made from fattened duck liver. The panel held that the district court did not abuse its discretion when it

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* The Honorable Wiley Y. Daniel, Senior District Judge for the U.S. District Court for Colorado, sitting by designation.

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

concluded that plaintiffs failed to raise serious questions concerning their Due Process Clause challenge, which alleged that the statute's definition of force feeding was vague and failed to give persons fair notice of what conduct was prohibited. The panel further held that the district court did not abuse its discretion when it concluded that § 25982 did not discriminate against interstate commerce or directly regulate interstate commerce.

COUNSEL

Michael Tenenbaum (argued), The Tenenbaum Law Firm, Santa Monica, California, for Plaintiffs-Appellants.

Stephanie F. Zook (argued), Deputy Attorney General; Constance L. LeLouis, Supervising Deputy Attorney General; Douglas J. Woods, Senior Assistant Attorney General; Kamala D. Harris, Attorney General of California, Sacramento, California, for Defendants-Appellees.

Melissa Grant, (argued) and Arnab Banerjee, Capstone Law APC, Los Angeles, California; Tiffany Hedgpeth, Jeremy Esterkin, and Bryce Woolley, Bingham McCutchen LLP, Los Angeles, California, for Amici Curiae.

OPINION

PREGERSON, Circuit Judge:

Plaintiffs produce and sell foie gras, a delicacy made from fattened duck liver. To produce their foie gras, Plaintiffs feed their ducks through a tube inserted directly in the ducks' esophagi. In July 2012, California Health & Safety Code § 25982 came into effect. The statute bans the sale of products that are the result of force feeding birds to enlarge their livers beyond normal size. We are called upon to review the district court's denial of Plaintiffs' motion to preliminarily enjoin the State from enforcing § 25982. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

FACTUAL BACKGROUND

Appellants Association des Éleveurs de Canards et d'Oies du Québec (the "Canadian Farmers") and HVFG LLC ("Hudson Valley") are non-California entities that raise ducks for slaughter and are producers and sellers of foie gras. Appellant Hot's Restaurant Group, Inc. ("Hot's Kitchen") is a restaurant in California that sold foie gras before § 25982 came into effect (collectively, "Plaintiffs").

Hudson Valley and the Canadian Farmers raise Moulard ducks. Moulard ducks are a hybrid of Muscovy male ducks and Pekin female ducks. They are bred for their capacity of ingestion and fat storage in their livers. In addition to foie gras, Hudson Valley and the Canadian Farmers produce and sell breasts,

legs, fat, bones, offal, and feathers from their Moulard ducks.

Generally, Moulard ducks are raised for foie gras through the following process. The Canadian Farmers and Hudson Valley take one-day-old ducks from the hatchery to breeding farms. There, the ducks are raised until they are fully grown, a process that generally takes eleven to thirteen weeks. For the first four weeks of their lives, the ducks eat pellets from feeding pans that are available to them twenty-four hours a day. In the next stage, which lasts one to two months, the ducks eat different pellets from feeding pans that are available to them twenty-four hours a day. For the next two weeks, the ducks continue to eat pellets from feeding pans that are available to them at only certain times during the day. In the final stage, called *gavage,* which lasts between ten to thirteen days, the ducks are hand-fed by feeders who use "a tube to deliver the feed to the crop sac at the base of the duck's esophagus."

STATUTORY BACKGROUND

The statutory provision Plaintiffs seek to enjoin, § 25982, is within the statute entitled "Force Fed Birds." Cal. Health & Safety Code §§ 25980 *et seq*. Section 25982 states: "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." *Id.* § 25982. Section 25981 further provides: "A person may not force feed a bird for the

purpose of enlarging the bird's liver beyond normal size, or hire another person to do so." *Id.* § 25981.[1]

Sections 25981 and 25982 became operative on July 1, 2012. The California Legislature delayed the effective date of the statutes from January 1, 2005 to July 1, 2012 "to allow a seven and one-half year period for persons or entities engaged in agricultural practices that include raising and selling force fed birds to modify their business practices." *Id.* § 25984(c).

PROCEDURAL BACKGROUND

The day after § 25982 came into effect, Plaintiffs filed a lawsuit to enjoin Defendants-Appellees Attorney General Kamala Harris, Governor Edmund Brown, and the State of California (collectively, the "State") from enforcing the statute. Plaintiffs argue that § 25982 is unconstitutional because it violates the Due Process Clause and the Commerce Clause of the United States Constitution.

Plaintiffs applied *ex parte* for a temporary restraining order and an order to show cause why a preliminary injunction should not issue. The district court denied the motion. Plaintiffs then filed a motion

[1] Plaintiffs do not seek to enjoin § 25981. Section 25981 prohibits force feeding birds in California. Because Plaintiffs do not raise their ducks in California, § 25981 does not preclude them from force feeding their ducks.

for preliminary injunction. The district court denied the motion, and Plaintiffs timely appealed.

DISCUSSION

I. Eleventh Amendment Immunity

The district court determined that the Attorney General is not entitled to Eleventh Amendment immunity and did not address the State of California's or the Governor's immunity claims. We must resolve an Eleventh Amendment immunity claim before reaching the merits. *Coal. to Defend Affirmative Action v. Brown,* 674 F.3d 1128, 1133 (9th Cir. 2012). We review a denial of immunity *de novo. Id.*

"States are protected by the Eleventh Amendment from suits brought by citizens in federal court." *Douglas v. Cal. Dep't of Youth Auth.,* 271 F.3d 812, 817, *amended by,* 271 F.3d 910 (9th Cir. 2001). Plaintiffs are plainly barred by the Eleventh Amendment from suing the State of California in federal court.

An exception under *Ex Parte Young,* 209 U.S. 123 (1908), however, allows citizens to sue state officers in their official capacities "for prospective declaratory or injunctive relief . . . for their alleged violations of federal law." *Coal. to Defend Affirmative Action,* 674 F.3d at 1134. The state official "'must have some connection with the enforcement of the act.'" *Id.* (quoting *Ex parte Young,* 209 U.S. at 157). That connection "must be fairly direct; a generalized duty to enforce state law or general supervisory power over

the persons responsible for enforcing the challenged provision will not subject an official to suit." *Id.* (quoting *L.A. Cnty. Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir. 1992)).

Here, Governor Brown is entitled to Eleventh Amendment immunity because his only connection to § 25982 is his general duty to enforce California law. *See, e.g., Nat'l Audubon Soc'y, Inc. v. Davis,* 307 F.3d 835, 846-47, *opinion amended on denial of reh'g,* 312 F.3d 416 (9th Cir. 2002).

We may affirm the district court's determination that the Attorney General is not entitled to Eleventh Amendment immunity on any sufficient ground. *See Papa v. United States,* 281 F.3d 1004, 1009 (9th Cir. 2002). Section 25983 expressly authorizes enforcement of the statute by district attorneys and city attorneys. Cal. Health & Safety Code § 25983(c) (stating that "[a] person or entity that violates this chapter [Force-Fed Birds] may be prosecuted by the district attorney of the county in which the violation occurred, or by the city attorney of the city in which the violation occurred").

Pursuant to Article V, § 13 of the California Constitution, the Attorney General not only has "direct supervision over every district attorney," but also has the duty "to prosecute any violations of law . . . [and] shall have all the powers of a district attorney," whenever she believes that the law is not being adequately enforced. Cal. Const. art. V, § 13. The combination of § 25983, which gives district attorneys

the authority to prosecute violations of § 25982, and the Attorney General's duty to prosecute as a district attorney establishes sufficient enforcement power for *Ex Parte Young*. *See Coal. to Defend Affirmative Action,* 674 F.3d at 1132-35 (affirming the denial of Eleventh Amendment to the President of the University of California because he was "duty-bound" to enforce the challenged statute, which precluded "using race as a criterion in admission decisions"); *Nat'l Audubon Soc'y, Inc.,* 307 F.3d at 842, 847 (affirming the denial of Eleventh Amendment immunity to state official with "direct authority over and principal responsibility for enforcing Proposition 4," a law "to protect wildlife and domestic pets").

The Attorney General's argument that she is entitled to Eleventh Amendment immunity because she has not shown she intends to enforce § 25982 is foreclosed by our decision in *National Audubon Society, Inc. v. Davis.,* 307 F.3d at 846. There, we held that a plaintiff need not show that a "present threat of enforcement" exists before invoking the *Ex Parte Young* exception. *Id.* Instead, a state official who contends that he or she will not enforce the law may challenge plaintiff's Article III standing based on "an unripe controversy." *Id.* at 847. The State makes no such challenge.

We affirm the district court's denial of Eleventh Amendment immunity to the Attorney General. We dismiss the State of California and Governor Brown from this lawsuit because they are immune from suit.

II. Denial of Plaintiffs' Preliminary Injunction

A. Standard of Review & Legal Standards

A plaintiff seeking a preliminary injunction must establish that: (1) he is "likely to succeed on the merits"; (2) he is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in his favor"; and (4) "an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). Under our "sliding scale" approach to evaluating the first and third *Winter* elements, a preliminary injunction may be granted when there are "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff," so long as "the other two elements of the *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131-32 (9th Cir. 2011) (internal quotation marks and citations omitted).

"We review a district court's grant or denial of a preliminary injunction for abuse of discretion and the underlying legal principles de novo." *DISH Network Corp. v. F.C.C.,* 653 F.3d 771, 776 (9th Cir. 2011). We may reverse the district court "only where [the district court] relied on an erroneous legal premise or abused its discretion." *Id.* Further, when we agree with the district court that a plaintiff has failed to show the likelihood of success on the merits, we "need not consider the remaining three [*Winter* elements]." *Id.* at 776-77.

B. The Scope of § 25982

We begin our analysis by addressing the parties' dispute over the scope of § 25982. Plaintiffs contend that the district court correctly concluded that § 25982 prohibits the sale of all products from force-fed birds including duck breasts and down jackets. The State argues that § 25982 covers only products that are the result of force feeding a bird to enlarge its liver beyond normal size, i.e., products made from an enlarged duck liver. We agree with the State's interpretation.

The scope of a statute "is a question of law," which we review *de novo*. *In re Lieberman,* 245 F.3d 1090, 1091 (9th Cir. 2001). In interpreting a state statute, we apply the state's rules of statutory construction. *Id.* at 1092. Under California law, a court must "look[ ] first to the language of the statute and give[ ] effect to its plain meaning." *Id.* "If the intent of the legislature is not clear from the language of the statute, legislative history may be considered." *Id.*

Section 25982 states, "[a] product may not be sold in California if it is *the result of* force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." Cal. Health & Safety Code § 25982 (emphasis added). "The phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection . . . ," *Kwikset Corp. v. Super. Ct.,* 51 Cal. 4th 310, 326 (2011) (quoting *Hall v. Time Inc.,* 158 Cal. App. 4th 847, 855 (2008)); *Troyk v. Farmers Grp., Inc.,* 171

Cal. App. 4th 1305, 1349 (2009) (interpreting phrase "as a result of" in statute "according to its common usage," which means "an element of *causation*"). The plain meaning of § 25982 is that it applies only to a product that is produced by force feeding a bird to enlarge its liver.

Although we need not consider the legislative history, it supports our interpretation. The accompanying Bill Analysis for Senate Bill 1520 which proposed the legislation Force Fed Birds, notes that the purpose of "th[e] bill is intended to prohibit the force feeding of ducks and geese . . . , Force feeding is the common method used to produce foie gras . . . , The Author states that *no other livestock product is produced via force feeding* . . . ," Sen. Comm. on Bus. & Professions (Cal. 2004), Analysis of S.B. 1520 as introduced Apr. 26, 2004, at 4 (emphasis added); Sen. Rules Comm. (Cal. 2004), Analysis of S.B. 1520 as amended May 6, 2004, at 5 (same).[2] Further, foie gras is the only product produced via force feeding mentioned in the Bill Analyses. Specifically, the Bill Analyses discuss the background of foie gras; countries that have banned force feeding to produce foie gras; grocers who have refused to purchase foie gras; whether there are alternative methods of producing

[2] We may take judicial notice of § 25982's legislative history. *Chaker v. Crogan,* 428 F.3d 1215, 1223 n.8 (9th Cir. 2005).

foie gras; and support for, and against, the foie gras industry.[3]

We conclude that § 25982 is limited to products that are produced by force feeding a bird for the purpose of enlarging the bird's liver beyond normal size; it therefore does not prohibit the sale of duck breasts, down jackets, or other non-liver products from force-fed birds.[4] In the district court, Plaintiffs' evidence showed that foie gras was the only product that was produced by force feeding.[5] Thus, the only product covered by § 25982 at issue in this appeal is foie gras.

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[3] *See* Sen. Comm. on Bus. & Professions (Cal. 2004), Analysis of S.B. 1520 as introduced Apr. 26, 2004, at 5-11; Sen. Rules Comm. (Cal. 2004), Analysis of S.B. 1520 as amended May 6, 2004, at 5-12; Assem. Comm. on Bus. and Professions (Cal. 2004), Analysis of S.B. 1520 as amended May 6, 2004, at 4-11; Sen. Third Reading (Cal. 2004), Analysis of S.B. 1520 as amended June 21, 2004, at 2-5; Sen. Third Reading (Cal. 2004), Analysis of S.B. 1520 as amended Aug. 17, 2004, at 2-5; Sen. Rules Comm. (Cal. 2004), Analysis of S.B. 1520 as amended Aug. 17, 2004, at 3-4, 6-7.

[4] Plaintiffs argue that § 25982 was intended to ban every duck product, not just foie gras, because the statute does not use the term "foie gras." Section 25982, however, does not prohibit foie gras. It bans the sale of foie gras produced through force feeding, but would not ban foie gras produced through alternative methods.

[5] During oral argument, Plaintiffs' counsel argued that the industry of down feathers relies on force feeding ducks, but Plaintiffs' declarations contain no evidence to support that argument.

C. Plaintiffs' Due Process Clause Challenge

Plaintiffs contend that they raised a serious question that the statute violates their due process rights because: (1) the statute's definition of force feeding is vague; and (2) the statute fails to give persons fair notice of what conduct is prohibited. We disagree on both points.

"Whether a statute or regulation is unconstitutionally vague is a question of law reviewed de novo." *United States v. Ninety-Five Firearms,* 28 F.3d 940, 941 (9th Cir. 1994). "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie,* 419 U.S. 544, 550 (1975). "To be struck down for vagueness, a statute or regulation must fail 'to give a person of ordinary intelligence fair notice that his contemplated conduct' is forbidden." *Donovan v. Royal Logging Co.,* 645 F.2d 822, 831 (9th Cir. 1981) (quoting *United States v. Dacus,* 634 F.2d 441, 444 (9th Cir. 1980)). "Economic regulation is subject to 'a less strict vagueness test' than criminal laws . . . ," *Great Am. Houseboat Co. v. United States,* 780 F.2d 741, 746 (9th Cir. 1986) (quoting *Vill. of Hoffman Estates v. Flipside Hoffman Estates, Inc.,* 455 U.S. 489, 498 (1982)).

1. The statute's definition for force feeding is not vague.

Section 25980 states, "[f]orce feeding a bird means 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(b). Plaintiffs incorrectly contend that the statute's definition of force feeding is unconstitutionally vague because it lacks an identifiable measurement of exactly how much food a bird can be fed. Plaintiffs' argument ignores key terms that define the process of force feeding. These terms demonstrate that the statute covers Plaintiffs' conduct in this case.

As Plaintiffs' evidence demonstrates, there are four feeding stages of Moulard ducks. In the first three stages, ducks feed themselves from feeding pans that are available either twenty-four hours a day or certain times during the day. But in the "final stage, known as *gavage*," each duck is "hand-fed [by a feeder] using a tube to deliver the feed to the crop sac at the base of the duck's esophagus." In fact, Merriam Webster defines "gavage" as the "introduction of material into the stomach by a tube." During the gavage stage, the feeders dictate how much food the ducks are fed.

The specific example of force feeding under the statute – feeding a bird using a tube so that the bird

will consume more food than it would consume voluntarily – is how Plaintiffs feed their ducks during the gavage stage. Thus, the district court did not abuse its discretion when it held that Plaintiffs failed to raise serious questions that, as applied to Plaintiffs, the definition of force feeding is not vague.

2. The statute gives fair notice of prohibited conduct.

Section 25982 states that "[a] product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." Cal. Healthy [sic] & Safety Code § 25982. According to Plaintiffs, the term "purpose" refers to a farmer's subjective intent in feeding his birds, and they are left to guess whether a farmer's state of mind violated the statute. We disagree with Plaintiffs' reading of the statute.

The term "for the purpose of" in the statute modifies the phrase "force feeding a bird." *See Am. Small Bus. League v. U.S. Small Bus. Admin.,* 623 F.3d 1052, 1054 (9th Cir. 2010) ("As a matter of syntax, the latter phrase most naturally modifies only the former phrase."). The natural reading of "force feeding a bird for the purpose of enlarging the bird's liver beyond normal size" is a description of the objective nature of the force feeding, rather than the subjective motive of the farmer. *See W. Watersheds Project v. Interior Bd. of Land Appeals,* 624 F.3d 983, 987 (9th Cir. 2010) (holding that a statute's phrase

"for the purpose of" did not refer to "subjective motives," but rather was an objective description of the conduct covered by the statute). Here, Plaintiffs do not contest that force feeding a bird through a tube inserted into the bird's esophagus is for the purpose of enlarging the duck's liver.

Finally, Plaintiffs' description of § 25982 as invidious because it imposes strict liability is without merit. "[C]ivil penalties may be imposed without *mens rea* requirements because they are indeed civil . . . ," *Humanitarian Law Project v. U.S. Treasury Dep't,* 578 F.3d 1133, 1152 (9th Cir. 2009). We therefore conclude that the district court did not abuse its discretion when it concluded that Plaintiffs failed to raise serious questions concerning their Due Process Clause challenge.[6]

D. Plaintiffs' Commerce Clause Challenge

Plaintiffs argue that we should find that § 25982 violates the Commerce Clause because the statute: (1) discriminates against interstate commerce; and (2) directly regulates interstate commerce. The district court held that Plaintiffs failed to raise a serious question on the merits of their claim, and we agree.

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[6] Plaintiffs also argue that § 25982 will be arbitrarily enforced to preclude only the sale of liver products, but those are the only products covered by the statute.

"Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris,* 682 F.3d 1144, 1147 (9th Cir. 2012) (quoting *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 87 (1984)). This limitation on the states to regulate commerce is "known as the dormant Commerce Clause." *Id.* The primary purpose of the dormant Commerce Clause is to prohibit "statutes that discriminate against interstate commerce" by providing benefits to "in-state economic interests" while "burdening out-of-state competitors." *Id.* at 1148 (quoting *CTS Corp. v. Dynamics Corp. of Am.,* 481 U.S. 69, 87 (1987), and *Dep't of Revenue v. Davis,* 553 U.S. 328, 337 (2008)).

The Supreme Court has adopted a "two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 578-79 (1986).

> [1] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court has] generally struck down the statute without further inquiry. [2] When, however, a statute has only indirect effects on interstate commerce and regulates

> evenhandedly, [the Court has] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Id. at 579 (citations omitted).[7] The district court did not abuse its discretion when it concluded that § 25982 falls into the second tier because the statute does not discriminate against interstate commerce or directly regulate interstate commerce.

1. Section 25982 is not discriminatory.

The Supreme Court has "interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 390 (1994); *Nat'l Ass'n of Optometrists,* 682 F.3d at 1148 (explaining that discriminatory statutes seek economic protectionism and are "'designed to benefit in-state economic interests by burdening out-of-state competitors'" (quoting *Dep't of Revenue,* 553 U.S. at 337)). Conversely, a statute that "treat[s] all private companies exactly the same" does not discriminate against interstate commerce. *United Haulers Ass'n, Inc.,* 550

[7] With respect to the first tier of the inquiry, more recent cases have applied strict scrutiny to discriminatory laws. *See, e.g., United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 343 (2007); *Conservation Force, Inc. v. Manning,* 301 F.3d 985, 995 (9th Cir. 2002).

U.S. at 342. This is so even when only out-of-state businesses are burdened because there are no comparable in-state businesses. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 119-20, 125 (1978).

Under § 25982, no entity can sell a product that "is the result of force feeding a bird" regardless of the product's source or origin. Cal. Health & Safety Code § 25982. As the district court correctly found, "[s]ection 25982's economic impact does not depend on *where* the items were produced, but rather *how* they were produced." Because § 25982 bans the sale of both intrastate and interstate products that are the result of force feeding a bird, it is not discriminatory. *See Pac. Nw. Venison Producers v. Smitch,* 20 F.3d 1008, 1012 (9th Cir. 1994) (holding that "[a]n import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items"); *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry,* 476 F.3d 326, 335 (5th Cir. 2007) (holding that a statute that "treats both intrastate and interstate trade of horsemeat equally by way of a blanket prohibition" cannot be "considered economic protectionism").

2. Section 25982 does not directly regulate interstate commerce.

A statute is not " 'invalid merely because it affects in some way the flow of commerce between the States.' " *Nat'l Ass'n of Optometrists,* 682 F.3d at 1148

(quoting *Great Atl. & Pac. Tea Co. v. Cottrell,* 424 U.S. 366, 371 (1976)). Instead, a statute violates the dormant Commerce Clause per se when it "*directly* regulates interstate commerce." *NCAA v. Miller,* 10 F.3d 633, 638 (9th Cir. 1993) (emphasis added).

Plaintiffs argue that the district court should have found that § 25982 directly regulates extraterritorial conduct because the statute: (a) targets out-of-state entities; (b) bans foie gras unless all farmers comply with California's standards; (c) controls commerce outside of California; and (d) will result in conflicting legislation. We disagree.

a. Section 25982 is not aimed at out-of-state producers.

Plaintiffs contend that § 25982 targets wholly extraterritorial activity because it is "aimed in only one direction: at out-of-state producers." Plaintiffs reason that § 25982 is "apparently directed at farmers who feed their ducks and geese outside [California]," because § 25981 already prohibits businesses in California from force feeding birds.

Plaintiffs misinterpret the interplay between the statutory provisions. Plaintiffs assume that § 25981 and § 25982 are functionally equivalent, with § 25981 targeting California entities and § 25982 targeting out-of-state entities. In truth, § 25981 serves an entirely different purpose than § 25982. Section 25981 prohibits entities from force feeding birds in California. But for § 25981, a California producer

could force feed ducks in California, and then sell foie gras outside of California. Section 25981, however, does not prohibit *the sale* of products produced by force feeding birds. That is where § 25982 comes in. Section 25982 applies to both California entities and out-of-state entities and precludes sales within California of products produced by force feeding birds regardless of where the force feeding occurred. Otherwise, California entities could obtain foie gras produced out-of-state and sell it in California. Thus, Plaintiffs' assertion that § 25982 is directed solely at out-of-state producers is incorrect.

b. Plaintiffs have not shown that § 25982 constitutes a total ban on foie gras or that a nationally uniform production method is required for foie gras.

Plaintiffs rely on *Schollenberger v. Pennsylvania,* 171 U.S. 1 (1898), to argue that § 25982 has directly regulated interstate commerce because it has stopped the free flow of foie gras between states. In *Schollenberger,* the Supreme Court invalided an import and sale ban on oleomargarine (margarine) that carried criminal penalties. *Id.* at 8. It held that the "absolute prohibition of an unadulterated, healthy, and pure article" violated the Commerce Clause. *Id.* at 13.

Plaintiffs would have us assume, without evidentiary support, that § 25982 amounts to a flat ban on foie gras. Plaintiffs' declarations do not demonstrate

that foie gras may be produced only by force feeding. The district court found that "the evidence may [ultimately] show that Section 25982 only precludes a more profitable method of operation – force feeding birds for the purpose of enlarging its liver – rather than affecting the interstate flow of goods." It may be that Plaintiffs are precluded from using force feeding to produce foie gras, but "the dormant Commerce Clause does not . . . guarantee Plaintiffs their preferred method of operation." *Nat'l Ass'n of Optometrists,* 682 F.3d at 1151. At this stage in the proceedings, Plaintiffs have not shown that the effect of § 25982 is a complete import and sales ban on foie gras.

Moreover, in *Schollenberger* the Supreme Court emphasized that Congress actively regulated the industry of oleomargine. 171 U.S. at 8. Congress had "given a definition of the meaning of oleomargarine, and ha[d] imposed a special tax on the manufacturers of the article, on wholesale dealers and upon retail dealers." *Id.* at 8. *See also Cloverleaf Butter Co. v. Patterson,* 62 S. Ct. 491, 502 (1942) (stating that "[t]he manufacture and distribution . . . of process and renovated butter is a substantial industry which, because of its multi-state activity, cannot be effectively regulated by isolated competing states").

In a different context, we have recognized that a state's regulation of a nationally uniform business can have extraterritorial effects. In *NCAA v. Miller,* we considered the constitutionality of a Nevada statute that imposed standards for how the NCAA,

an interstate organization, could run its enforcement proceedings. 10 F.3d at 638-39. "[F]or the NCAA to accomplish its goals, [its] enforcement procedures must be applied even-handedly and uniformly on a national basis." *Id.* at 638 (internal quotation marks and citation omitted). The national uniformity required by the NCAA meant that the NCAA could not adopt Nevada's procedures for Nevada, and alternative procedures for its business in other states. *Id.* at 639. As a result, to avoid liability under Nevada's statute, the NCAA "would have to apply Nevada's procedures to enforcement proceedings throughout the country." *Id.* We concluded that Nevada's statute directly regulated interstate commerce. *Id.*

Plaintiffs argue that the need for national uniformity for the foie gras market is evidenced by the federal Poultry Products Inspection Act's ("PPIA") requirement that ducks undergo several stages of federal inspection.[8] The PPIA ensures that "poultry products distributed to [the public] are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 451. Plaintiffs contend that the PPIA provides a comprehensive set of detailed regulations that includes standards indicating that "ducks will be hand-fed to create foie gras." The standards to which Plaintiffs refer, however, merely state that "Goose liver and duck liver foie gras (fat

[8] Plaintiffs did not raise preemption as a basis for the preliminary injunction in the district court. Thus, the issue of preemption is not before us.

liver) are obtained exclusively from specially fed and fattened geese and ducks." It says nothing about the force feeding of geese and ducks.

At this stage in the proceedings, Plaintiffs have not demonstrated that a nationally uniform foie gras production method is required to produce foie gras. If no uniform production method is required, Plaintiffs may force feed birds to produce foie gras for non-California markets. California's standards are therefore not imposed as the sole production method Plaintiffs must follow. We therefore hold that the district court correctly concluded that Plaintiffs have not raised serious questions that § 25982 "require[s] an individual or business to choose between force feeding a bird in another state and complying with California law."

c. Section 25982 is not a price fixing statute.

Plaintiffs rely heavily on *Healy v. Beer Institute, Inc.,* 491 U.S. 324 (1989), and *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935), to assert that § 25982's practical effect is to control conduct outside the boundaries of California. In *Healy,* the Supreme Court struck down Connecticut's statute that "require[d] out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers are, as of the moment of posting, no higher than the prices at which those products are sold in . . . bordering States." 491 U.S. at 326. The

Supreme Court concluded that the statute "controll[ed] commercial activity occurring wholly outside the boundary of the State" because it "preclude[d] the alteration of out-of-state prices after the moment of affirmation." *Id.* at 337-38. Similarly, in *Baldwin,* the Supreme Court struck down a New York statute that prohibited the sale of milk within New York if the milk was acquired from Vermont farmers at a lower price than New York farmers would have been paid for the milk. *Baldwin,* 294 U.S. at 521.

The Supreme Court has explained that *Healy* and *Baldwin* involved "price control or price affirmation statutes." *Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 669 (2003). Accordingly, the Court has held that *Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not "t[ie] the price of its in-state products to out-of-state prices." *Id.* Here, § 25982 does not impose any prices for duck liver products and does not tie prices for California liver products to out-of-state prices. *Healy* and *Baldwin* are thus inapplicable in this case.

d. Plaintiffs have not shown that § 25982 will have the practical effect of conflicting legislation.

Plaintiffs warn that if § 25982 is found to be constitutional it will result in "[b]alkanization in the market for duck products." Plaintiffs, however, cite to proposed legislation, not enacted legislation. The only

other domestic statute on foie gras mentioned by the parties and amicus curiae is Chicago's former ordinance prohibiting foie gras. Although the Chicago ordinance was upheld by an Illinois district court, when the appeal was pending in the Seventh Circuit, the city repealed the ordinance and the decision was vacated. *See Ill. Rest. Ass'n v. City of Chicago,* 492 F. Supp. 2d 891 (N.D. Ill. 2007), *vacated as moot,* 06 C 7014, 2008 WL 8915042 (N.D. Ill. Aug. 7, 2008). On this record, Plaintiffs' fear of balkanization is based on speculation. "[T]he [Supreme] Court has never invalidated a state or local law under the dormant Commerce Clause based upon mere speculation about the possibility of conflicting legislation." *S.D. Myers, Inc. v. City & Cnty. of San Francisco,* 253 F.3d 461, 470 (9th Cir. 2001).

For these reasons we conclude that the district court did not abuse its discretion when it concluded that Plaintiffs failed to raise serious questions concerning their Commerce Clause challenge.

3. Section 25982 does not substantially burden interstate commerce.

The district court correctly determined that Plaintiffs failed to raise serious questions that § 25982 discriminates or directly regulates interstate commerce. Consequently, the district court properly analyzed, under *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970), whether "the burden [the statute] imposes on interstate commerce is 'clearly excessive in relation to the

putative local benefits.'" *S.D. Myers, Inc.,* 253 F.3d at 471 (quoting *Pike,* 397 U.S. at 142).

We have explained that under *Pike,* a plaintiff must first show that the statute imposes a substantial burden before the court will "determine whether the benefits of the challenged laws are illusory." *Nat'l Ass'n of Optometrists,* 682 F.3d at 1155. We conclude that the district court correctly held that Plaintiffs did not raise a serious question that § 25982 will substantially burden interstate commerce.

First, as the district court recognized, most statutes that impose a substantial burden on interstate commerce do so because they are discriminatory. *See id.* at 1148 (noting that "[m]ost regulations that run afoul of the dormant Commerce Clause do so because of discrimination"). As discussed above, § 25982 is not discriminatory.

Second, less typically, statutes impose significant burdens on interstate commerce as a consequence of "inconsistent regulation of activities that are inherently national or require a uniform system of regulation." *Id.* But here, Plaintiffs have failed to show that the foie gras market is inherently national or that it requires a uniform system of regulation. *See Valley Bank of Nev. v. Plus Sys., Inc.,* 914 F.2d 1186, 1192 (9th Cir. 1990) (noting that examples of "courts finding uniformity necessary" fall into the categories of "transportation" or "professional sports league[s]").

Third, the district court found that although Plaintiffs alleged that § 25982 would "result in the

loss of over $5 million in interstate and foreign sales of wholesale foie gras and moulard duck products, this figure overestimates Section 25982's impact."[9] Plaintiffs' alleged loss includes duck products, such as duck breasts, that are not produced by force feeding birds and are not covered by § 25982. Additionally, as the district court emphasized, § 25982 may only preclude Plaintiffs' "more profitable" method of producing foie gras, rather than Plaintiffs' foie gras production. Thus, Plaintiffs failed to raise serious questions that § 25982 imposes a substantial burden on interstate activity.

We likewise affirm the district court's holding that Plaintiffs failed to raise a serious question that § 25982's burden clearly exceeds its local benefits. The parties agree that the State has an interest in preventing animal cruelty in California. *See United States v. Stevens,* 130 S. Ct. 1577, 1585 (2010) ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies."). The district court found that the State has pursued its interest in preventing animal cruelty "both by outlawing the actual practice of force-feeding birds for the purpose of enlarging their livers (Section 25981) and the sale of such products (Section 25982)."

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[9] As they did in the district court, Plaintiffs make no more than a passing reference to § 25982's alleged burden on foreign commerce.

Plaintiffs argue on appeal that precluding sales of products produced by force feeding birds "does nothing" to prevent animal cruelty in California. But in the district court, "Plaintiffs . . . presented no evidence that Section 25982 is an ineffective means of advancing that goal." Plaintiffs give us no reason to doubt that the State believed that the sales ban in California may discourage the consumption of products produced by force feeding birds and prevent complicity in a practice that it deemed cruel to animals. *Cf. Empacadora de Carnes de Fresnillo, S.A. de C.V.,* 476 F.3d at 336 (concluding that a state ban on slaughtering and selling horsemeat for human consumption may preserve horses and prevent human consumption of horsemeat because it "remov[es] the significant monetary incentives" in the horsemeat market). "[T]he Supreme Court has frequently admonished that courts should not 'second-guess the empirical judgments of lawmakers concerning the utility of legislation.'" *Pac. Nw. Venison Producers,* 20 F.3d at 1017 (quoting *CTS Corp.,* 481 U.S. at 92).

Plaintiffs argue that less burdensome alternatives to § 25982 exist. Plaintiffs urge us to rewrite § 25982 by restricting the statute to "sales of products from ducks that have been *force fed in California.*" We will not do so. "[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. *Nat'l Ass'n of Optometrists,* 682 F.3d at 1157.

Because we affirm the district court's holding that Plaintiffs failed to raise a serious question that they are likely to succeed on the merits, we need not consider the remaining *Winter* elements of whether Plaintiffs will suffer irreparable harm; whether the balance of equities tip in Plaintiffs' favor; or whether an injunction is in the public interest. *Winter,* 555 U.S. at 20; *DISH Network Corp.,* 653 F.3d at 776-77.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's denial of Plaintiffs' motion for a preliminary injunction. We **REMAND** for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D´OIES DU QUÉBEC, ET AL., Plaintiffs, v. KAMALA D. HARRIS, ET AL., Defendants.	2:12-cv-05735-SVW-RZ ORDER DENYING PLAINTIFFS' MOTION for Preliminary Injunction To Enjoin Defendants from Enforcing Section 25982 of the California Health & Safety Code against Plaintiffs or the Sale of Products from Moulard Duck [51] (Filed Aug. 28, 2012)

I. INTRODUCTION AND FACTUAL BACKGROUND

On September 29, 2004, Governor Arnold Schwarzenegger signed California Senate Bill 1520 ("SB 1520"). *See* Pls.' Req. for Judicial Notice A (Dckt. 52). SB 1520 sought to regulate the practice of force-feeding birds, the preferred method of producing foie gras.[1] According to SB 1520's author, force-feeding

[1] French for "fatty liver," foie gras is fattened duck or goose liver.

requires "restraining the bird and inserting a 10- to 12- inch metal or plastic tube into the bird's esophagus and delivering large amounts of concentrated meal and compressed air into the bird." *See* Defs.' Req. for Judicial Notice, Ex. 1 (Dckt. 58). Traditionally, foie gras was made from geese; however, for mainly financial reasons, producers have in recent years used primarily ducks instead. *Id*. Most producers use the "moulard duck," a hybrid of the male Muscovy duck and female Pekin duck. *Id*. From SB 1520's legislative history and the declarations submitted by the parties, it appears that foie gras is the only product sold that requires a bird to be force-fed: although sellers of foie gras also sell other parts of force-fed ducks (such as their breasts and legs), force-feeding is not required to produce them.

SB 1520 added five new sections to California's Health and Safety Code. Section 25981 bars any person from "force feed[ing] a bird for the purpose of enlarging the bird's liver beyond normal size, or hir[ing] another person to do so." Cal. Health & Safety Code § 29581. Section 25982 bars the sale of a product "in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." Health & Safety §25982. The statute defines force-feeding a bird as "a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily," through methods such as "delivering feed through a tube or other device inserted into the bird's esophagus." Health & Safety § 25980(b). The bill provided

for civil penalties of up to $1,000 per violation, which can be issued by "[a] peace officer, officer of a humane society as qualified under Section 14502 or 14503 of the Corporations Code, or officer of an animal control or animal regulation department of a public agency, as qualified under Section 830.9 of the Penal Code, may issue a citation to a person or entity that violates this chapter." Health & Safety § 25983. Finally, the bill delayed the effective date of Section 25981 and 25982 until July 1, 2012, "to allow a seven and one-half year period for persons or entities engaged in agricultural practices that include raising and selling force fed birds to modify their business practices." Health & Safety § 25984© [sic].

Sections 25981 and 25982 became effective on July 1, 2012. On July 2, 2012, Plaintiffs filed a complaint in this Court challenging the constitutionality of only Section 25982, the ban on sales of products from force-fed birds. (Dckt.1.) Plaintiffs are a collection of organizations and businesses that sell various duck products, including foie gras. Plaintiff Association des Eleveurs de Canards et d'Oies du Québec ("the Association") is an association of Quebec's "leading producers and exporters of foie gras and other products from ducks raised for foie gras" that "account for virtually all of the production of such products in Canada as well as 100% of the imports of such products to the United States." First Amended Complaint ("FAC") ¶ 7. Plaintiff HVFG LLC ("Hudson Valley") is a New York producer of duck products and is "the largest producer of foie gras and other products

raised for foie gras in the United States." FAC ¶ 6. Plaintiff Hot's Restaurant Group, Inc., owns and operates restaurants in Southern California that sold foie gras. FAC ¶ 7. Plaintiff Gauge Outfitters, Inc, is a California corporation that sells "leading brands of ski apparel, including goose down jackets." FAC ¶ 8. Plaintiffs named the State of California, California Attorney General Kamala D. Harris, and California Governor Edmund G. Brown as defendants. FAC ¶¶ 9-11.

Plaintiffs' First Amended Complaint alleges that Section 25982 is unconstitutional on three grounds: first, that Section 25982 is unconstitutionally vague; second, that it violates the dormant Commerce Clause; and third, that it is pre-empted by the Federal Poultry Products Inspection Act ("PPIA"), 21 U.S.C. §§ 451-472. FAC ¶¶ 64-107. Plaintiffs requested declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, as well as injunctive relief. FAC ¶¶ A-C. On July 5, 2012, Plaintiffs filed an ex parte application for a temporary restraining order in this Court, which was denied on July 18, 2012. (Dckt. 6, 35.) On August 21, 2012, Plaintiffs filed the instant motion for a preliminary injunction of Section 25982. (Dckt 51.)

Plaintiffs filed several declarations in support of their motion for a preliminary injunction. (Dckt. 51.) According to Plaintiffs, the Association is losing an estimated $100,000 a month of "moulard duck products" sales due to Section 25982, Cuchet Decl. ¶ 9 (72,845), Nassans Decl. ¶¶ 3-4; Hudson Valley, a little

over $250,000 a month of "edible moulard products," Henley Decl. ¶¶ 16-19; and Hot's Restaurant $6,000 a month in sales of "dishes made with foie gras." Chaney Decl. ¶ 12. Other businesses involved in the production, distribution, and sale of foie gras and other moulard duck products also submitted declarations. According to their declarations, these businesses are losing a little less than $120,000 in monthly sales of foie gras and other moulard duck products because of Section 25982. Ambrose Decl. ¶¶ 1-4; Grandjean Decl. ¶ 4; Stout Decl. ¶ 3; Vanden Broeder Decl. ¶ 3[2]; Beylier Decl. ¶¶ 4-5, 12. However, at least two of these businesses have been able to procure duck products other than foie gras (such as duck breasts) from suppliers apparently unaffected by Section 25982. Vanden Broeder Decl. ¶ 7; Beylier Decl. ¶¶ 15-16; Cayer Decl. ¶ 4. Plaintiff Gauge Outfitter also submitted a declaration, including print-outs from websites of the various suppliers of the outerwear sold at its stores. Craycraft Decl. ¶ 6-9. Two of the print-outs indicate that Gauge Outfitter's suppliers have taken steps to ensure that the down feathers used in their gear do not come from force-fed birds. Craycraft Decl. Ex. A, B.

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[2] According to the Vanden Broeder Declaration, Vandif Specialty Foods, Inc., a California business, bought $30,919.87 dollars worth of foiegras from the Association for the twelve months ending June 30, 2012. Vanden Broeder Decl. ¶ 3. The declaration does not indicate at what price the foie-gras was resold, so for calculation purposes the Court used the $30,919.87 figure provided in the declaration.

II. STANDARD FOR GRANTING A PRELIMINARY INJUNCTION

A preliminary injunction is "'an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Lopez v. Brewer,* 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong,* 502 U.S. 968, 972 (1997) (per curiam) (citation omitted). A plaintiff seeking a preliminary injunction must establish that he is 1) likely to succeed on the merits; 2) likely to suffer irreparable harm in the absence of preliminary relief; 3) that the balance of equities tips in his favor; and, 4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008); *Farris v. Seabrook,* 677 F.3d 858, 864 (9th Cir. 2012) (same).

Although they are often articulated separately, the Ninth Circuit has held that the first and third requirements – the likelihood of success on the merits and the balance of equities – should be considered in tandem. *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding-scale" approach, these two elements "are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id*. at 1131. Thus, the standard for granting a preliminary injunction varies depending on the relative harm and the likelihood of success on the merits. *Id*. For example, the Ninth Circuit has articulated a "serious questions" test, whereby a plaintiff need only raise "serious questions going to the merits," rather than a likelihood of

success on the merits, when he or she can also show that the balance of hardships tips "sharply towards the plaintiff." *Id*. at 1135. Even under the serious questions test, however, an applicant must demonstrate that they are likely to suffer irreparable harm and that the injunction is in the public interest. *Id*.

At a minimum, then, Plaintiffs must raise a "serious question going to the merits" in order to prevail on their motion for a preliminary injunction. Because they have not done so here, the Court will assume, without deciding, that the serious questions test is the appropriate standard.

III. IRREPARABLE HARM

Plaintiffs "must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction." *Alliance for the Wild Rockies,* 632 F.3d at 1131. Plaintiffs claim that they are suffering "irreparable harm" in the form of $360,000 a month in lost sales. *See* Pls.' Br. In Supp. of Mot. For Prelim. Inj. ("Br. in Supp.") 27.

Monetary losses are usually not considered irreparable harm for purposes of granting a preliminary injunction. Most applicants who suffer such losses have "an adequate alternate remedy in the form of money damages." Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Richard L. Marcus, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995). In this case, however, the State's Eleventh Amendment immunity would prevent Plaintiffs from

recovering lost sales, even were they to succeed on the merits. Thus, Plaintiffs are likely to suffer irreparable harm if a preliminary injunction is not granted. *See California Pharmacists Ass'n v. Maxwell-Jolly,* 563 F.3d 847, 852 (9th Cir. 2009) *vacated on other grounds and remanded sub nom. Douglas v. Indep. Living Ctr. of S. Cal., Inc.,* 132 S. Ct. 1204 (U.S. 2012) ("Because the economic injury doctrine rests only on ordinary equity principles precluding injunctive relief where a remedy at law is adequate, it does not apply where, as here, the Hospital Plaintiffs can obtain no remedy in damages against the state because of the Eleventh Amendment."), *O'Brien v. Appomattox Cnty., Va.,* 213 F. Supp. 2d 627, 631-32 (W.D. Va. 2002) (finding irreparable harm from a state law that would result in $80,000 of losses to plaintiffs that would not be recoverable even were the plaintiffs to succeed on the merits because of the state's Eleventh Amendment immunity).

IV. LIKELIHOOD OF SUCCESS ON THE MERITS

A. Jurisdiction

Before turning to the merits of Plaintiffs' motion, the Court first addresses the State's arguments that this Court does not have jurisdiction to hear Plaintiffs' case.

1. Eleventh Amendment Immunity

Defendants argue that the Eleventh Amendment bars Plaintiffs' action. Plaintiffs have named the state of California, Governor Edmund G. Brown, and Attorney General Kamala Harris as defendants. "The Eleventh Amendment grants to states a sovereign immunity from suit that, when invoked, bars adjudication of a dispute in federal court." *Agua Caliente Band of Cahuilla Indians v. Hardin,* 223 F.3d 1041, 1045 (9th Cir. 2000) (footnote omitted). However, there is an exception that allows federal courts to hear suits to enjoin allegedly unconstitutional state laws, notwithstanding the Eleventh Amendment's bar. Under the Supreme Court's decision in *Ex Parte Young,* 209 U.S. 123 (1908), plaintiffs may bring suit in federal court "against state officials for the purpose of enjoining the enforcement of an unconstitutional state statute." *Okpalobi v. Foster,* 244 F.3d 405, 411 (5th Cir. 2001). This exception is

> premised on the fiction that such a suit is not an action against a "State" and is therefore not subject to the sovereign immunity bar. The *Young* doctrine strikes a delicate balance by ensuring on the one hand that states enjoy the sovereign immunity preserved for them by the Eleventh Amendment while, on the other hand, giving recognition to the need to prevent violations of federal law.

Agua Caliente Band of Cahuilla Indians, 223 F.3d at 1045 (internal citation and quotation marks omitted).

However "a plaintiff may not avoid [the Eleventh Amendment's] bar simply by naming an individual state officer as a party in lieu of the State." *Okpalobi,* 244 F.3d at 411. Rather, a named defendant must have some connection with enforcement of the challenged law, a connection that "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Snoeck v. Brussa,* 153 F.3d 984, 986 (9th Cir. 1998) (internal citations and quotation marks omitted). The connection is "determined under state law depending on whether and under what circumstances a particular defendant has a connection with the challenged state law." *Id*.

Here, California's own statutes indicate that, at a minimum, the Attorney General has the power to enforce Section 25982. Section 25983 provides that "*[a] peace officer* . . . may issue a citation to a person or entity that violates this chapter." Cal. Health & Safety Code § 25983 (emphasis added). The Attorney General herself is a peace officer under California law. Cal. Penal Code § 830.1. Thus, at least one named defendant is proper, and the *Ex Parte Young* exception to the Eleventh Amendment confers upon this Court jurisdiction to hear Plaintiffs' constitutional challenge.

2. Ripeness

Defendants further argue that Plaintiffs' claims are not ripe because they have not shown "imminent or even likely prosecution for violating the statue." Opp'n of the State of Cal., Governor of Cal., and Att'y Gen. to Pl.'s Mot. For Prelim. Inj. 6. Defendants' argument lacks merit. Facing almost identical facts, the Ninth Circuit found the claims at issue to be ripe in *National Audubon Society, Inc. v. Davis,* 307 F.3d 835, 856 (9th Cir. 2002). The plaintiffs in *Davis* challenged California's Proposition 4, which banned the use of certain traps and poisons to capture or kill wildlife in the state. *Id*. at 843. As a result of Proposition 4, many private trappers stopped using "leghold traps," which, the court observed, caused them "actual, ongoing economic harm resulting from their cessation of trapping." *Id*. at 855. Thus, the Ninth Circuit found the trappers' claim ripe because the "*gravamen of the suit is economic injury rather than threatened prosecution*." *Id*. Moreover, the "prudential" requirements of Article III – fitness for judicial resolution and the hardship suffered by the trappers – were satisfied. *Id*. at 857. The court reasoned that "more specific facts surrounding possible actions to enforce the statute will not aid resolution" of the case and the trappers' economic injury would continue "[f]or so long as they refrained from trapping." *Id*.

Plaintiffs are in exactly the same situation that the trappers in *Davis* were. Each day, they are losing sales because of Section 25982. Moreover, this is not a case in which specific facts from an enforcement

action would aid resolution. Thus, Plaintiffs' claims are ripe and this Court properly has jurisdiction.

B. Vagueness

Plaintiffs contend that the definition of "force-feeding" is unconstitutionally vague. Br. in Supp. 10-11. Though the definition of "force feeding" provided in Section 25980 uses language that does not lend itself to perfect clarity (especially the phrase "typical bird of the same species"), the term "force feeding" itself is sufficiently clear to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972).

1. Legal Standard

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned,* 408 U.S. at 108. Vague laws

> offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit

> standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09.

However, the "degree of vagueness tolerated by the Constitution depends in part on the nature of the enactment." *Craft v. Nat'l Park Serv.,* 34 F.3d 918, 922 (9th Cir. 1994). Thus, the Supreme Court has held that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498 (1982). Similarly, statutes that impose only civil penalties are reviewed for vagueness with "somewhat greater tolerance than one involving criminal penalties because the consequences of imprecision are less severe." *Craft,* 34 F.3d at 922 (internal citations and quotation marks omitted). A scienter requirement may also "mitigate vagueness." *Id*. Finally, "'perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights,' in which case a more stringent vagueness test applies." *Id*. (quoting *Hoffman Estates,* 455 U.S. at 499).

2. Discussion

Section 25982 bars the 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. 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." Health & Safety Code § 25980. Methods of force-feeding include, but are not limited to, "delivering feed through a tube or other device inserted into the bird's esophagus." *Id*.

Plaintiffs argue that the phrase "more food that [sic] a typical bird of the same species" provides "no intelligible measure by which a birds' food consumption is to be assessed." Br. in Supp. 11. This argument omits key terms and phrases that clarify this somewhat ambiguous phrase: indeed, this is a case where less would have been more. Most importantly, the statute bans the sale of products that are the result of "force-feeding." That term is self-explanatory: it is the "forcible administration of food." MERRIAM-WEBSTER'S DICTIONARY. Section 25980 provides further clarity by giving examples of force-feeding methods, such as "delivering feed through a tube or other device inserted into the bird's esophagus." This language provides enough guidance to give a person "of ordinary intelligence a reasonable opportunity to know what is prohibited." Demanding more risks ignoring the Supreme Court's warning that the due process clause should not be used to create an "insuperable obstacle to legislation" that demands perfect clarity and

precise guidance. *U.S. v. Petrillo,* 332 U.S. 1, 7 (1947); *Holder v. Humanitarian Law Project,* 130 S. Ct. 2705, 2719 (2010) (quotations and citations omitted) ("But perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.") (internal citations and quotation marks omitted).

Plaintiffs contend that Section 25982 is "especially invidious" when it comes to "sellers of duck or goose products" like Hot's or Gauge Outfitters – businesses that buy duck products but are not involved in raising them. Plaintiffs claim that such businesses "have no idea how much – let alone for what purpose – any particular duck of [sic] goose may have been fed." Br. in Supp. 14. This argument misses the purpose of the vagueness inquiry. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the *indeterminacy of precisely what that fact is*." *United States v. Williams,* 553 U.S. 285, 306 (2008) (emphasis added). Though it may be difficult to determine where a particular duck liver, breast, or feather came from, it is clear that the government must prove that at least some portion of the product being sold come from a bird that was force fed for the purpose of enlarging its liver. Section 25982's application does not depend on "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id*.

Moreover, Section 25982 is the type of statute that can tolerate a greater degree of vagueness. First, and most importantly, the law does not "inhibit the exercise of constitutionally protected rights." *Craft,* 34 F.3d at 922. Second, Section 25982 imposes only civil penalties. Third, the law regulates economic activity, giving Plaintiffs, who "face economic demands to plan behavior carefully," the opportunity to "consult relevant legislation in advance of action." *Hoffman Estates,* 455 U.S. at 498. Indeed, Plaintiffs have had seven and a half years to plan for Section 25982 and to determine exactly what it would apply to. Moreover, as Plaintiffs' own declarations indicate, the business community appears to understand what "force-feeding" means. In the exhibits attached to Plaintiff Gauge Outfitter's Co-Owner David Craycraft's Declaration, outerwear providers North Face and Patagonia each indicate on their websites that they have taken steps to ensure that the down feathers they use in their products are not the product of "force fed" birds. The fact that businesses use this term lends further credence to the notion that it gives consumers enough notice of what, exactly, Section 25982 prohibits.

For these reasons, Plaintiffs do not raise serious questions going to the merits on their vagueness challenge.

C. The Dormant Commerce Clause

Plaintiffs contend that Section 25982 is unconstitutional under the dormant Commerce Clause for three reasons. First, they argue that it is invalid per se as a direct regulation of interstate commerce; second, that it "wreaks havoc on the federal interest in national uniformity in the market for poultry products;" and third, that it "massively burdens interstate and foreign commerce without advancing any legitimate interest." Br. in Supp. 14-27.[3] For the reasons explained below, none raise a serious questions [sic] going to the merits.

1. Legal Standard

"The Commerce Clause as written is an affirmative grant of power to Congress to regulate interstate commerce, but from it courts have long inferred a prohibition on state actions limiting interstate

[3] Although Plaintiffs' First Amended Complaint includes an allegation that Section 25982 is pre-empted by federal law, *see* FAC ¶¶ 94-101, their motion for preliminary injunction is based only upon vagueness and Commerce Clause grounds. Other than their vagueness challenge, each one of their arguments on the merits is entitled "Commerce Clause." *See* Br. in Supp. 14, 18, 23. Plaintiffs' failure to argue pre-emption here may be because their initial complaint did not include a pre-emption challenge, and their motion for a preliminary injunction was filed before their First Amended Complaint. (Dckt. 1, 651, 54.) Nonetheless, because Plaintiffs did not raise their pre- emption challenge in their preliminary injunction briefing papers, the Court will consider only the Plaintiffs' vagueness and Commerce Clause challenges.

commerce." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown,* 567 F.3d 521, 523 (9th Cir. 2009). Modernly, the primary role of the dormant Commerce Clause has been to guard against state economic protectionism, "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Nat'l Ass'n of Optometrists & Opticians v. Harris,* 682 F.3d 1144, 1147 (9th Cir. 2012) (quoting *Dep't of Revenue v. Davis,* 533 U.S. 328, 337-38 (2008)). *See also C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 390 (1994) (noting that the "central rationale" of the dormant Commerce Clause "is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

In light of this primary purpose, 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." *Harris,* 682 F.3d at 1148, 1150. Such laws are subject to strict scrutiny. *Brown,* 567 F.3d at 521.[4] Thus, for example, the Supreme Court struck

[4] At one point, both the Supreme Court and the Ninth Circuit have indicated that discriminatory laws are invalid "without further inquiry." *Valley Bank of Nev. v. Plus Sys., Inc.,* 914 F.2d 1186, 1189 (9th Cir. 1990) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 578-79 (1986)). However, more recently, both the Supreme Court

(Continued on following page)

down a Maine law that provided a lesser tax benefit to charitable institutions that were "conducted or operated principally for the benefit of persons *who are not residents of Maine*." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,* 520 U.S. 564, 568, 571 (1997) (internal citations and quotation marks omitted) (emphasis added). The Court has also consistently struck down facially-neutral laws that have discriminatory effects. See, e.g. *C & A Carbone,* 511 U.S. at 386; *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333 (1977).

However, the dormant Commerce Clause's reach extends beyond discriminatory laws. Exactly how and to what extent has not always been clear: as "Justice Scalia has candidly observed[,] . . . 'once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a quagmire.'" *Harris,* 682 F.3d at 1149 (quoting *W. Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (internal quotation marks omitted)). However, at least two distinct lines of inquiry can be discerned out of this "quagmire." First, state laws that "directly regulate" interstate commerce are, like discriminatory laws, almost always found invalid. *See, e.g. Healy v. Beer Inst.,* 491 U.S. 324, 336 (1989). Second, if a state law does not discriminate against nor directly regulate interstate

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and the Ninth Circuit have applied strict scrutiny analysis to discriminatory laws. *See C & A Carbone,* 511 U.S. at 392 (1994); *Brown,* 567 F.3d at 524.

commerce but still "substantially burdens" it, the law will be scrutinized under a more lenient balancing test. *Valley Bank of Nev.,* 914 F.2d at 1189. As the Ninth Circuit has noted, only a small number of statutes have been struck down under this balancing test, and those that do usually violate the dormant Commerce Clause because they result in "inconsistent regulation of activities that are inherently national or require a uniform system of regulation." *Harris,* 682 F.3d at 1148.

2. Discrimination Against Interstate Commerce

A statutory scheme can discriminate against out-of-state interests in three ways: 1) facially; 2) purposefully; or, 3) in practical effect. *Brown,* 567 F.3d at 525 (internal citations and quotation marks omitted). Plaintiffs do not argue that Section 25982 facially or purposefully discriminates against out-of-state entities, only that its effect is to favor in-state over out-of-state interests. *See* Br. in Supp. 23-24.

Discrimination, the Supreme Court has held, "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.,* 511 U.S. 93, 99 (1994); see also *Brown,* 567 F.3d at 525 ("To determine whether the laws have a discriminatory effect it is necessary to compare [out-of-state producers] with a similarly situated in-state entity."). Comparing in-state and out-of-state producers of products

that are "the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size," it is clear that Section 25982 has no discriminatory effect whatsoever. In-state and out-of-state producers of both foie gras and other duck products are treated exactly the same under Section 25982. The statute creates no incentive for consumers to purchase California products that are the "result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size" over out-of-state ones; it simply bans the purchase of such products altogether. Put another way, Section 25982's economic impact does not depend on *where* the items were produced, but rather *how* they were produced. To paraphrase the Ninth Circuit, "California treats out-of-state [producers], such as [Plaintiffs], the same as in-state [producers]. The statutes and regulations apply to both." *Brown,* 567 F.3d at 525. The fact that most, or even all, of the adverse effects of Section 25982 fall on out-of-state entities does not, alone, render it unconstitutional. *See Exxon Corp. v. Governor of Md.,* 437 U.S. 117, 126-27 (1978) (upholding a Maryland law that barred petroleum producers and refiners from owning retail service stations in Maryland even though all producers and refiners were located out-of-state); *Brown,* 567 F.3d at 524-25 (upholding a California law impacting mostly out-of-state businesses).

Plaintiffs argue that Section 25982's discriminatory effect is "starting to be felt" because "California customers of Hudson Valley's moulard duck breasts are turning to in-state sellers of similar duck breasts,

such as Grimaud Farms." Br. in Supp. 23-24; Beylier Decl. ¶¶ 14-16; Vanden Broeder Decl. ¶ 8; Cayer Decl. ¶¶ 1-4. Plaintiffs confuse correlation for causation. The decision of Hudson Valley's former California customers – Vandif Specialty Foods and Savory Gourmet – to buy duck breasts from California-based Grimaud Farms is neither mandated nor incentivized by Section 25982. If, for example, Hudson Valley began selling duck breasts from non-force-fed ducks, Section 25982 would give Vandif and Savory Gourmet no additional reason to purchase its goods from Grimaud instead of Hudson Valley. As stated above, Section 25982's application does not depend on where the goods are made, only how.

Thus, Plaintiffs have not raised a serious question that Section 25982 impermissibly discriminates against out-of-state entities.

3. Direct Regulation of Interstate Commerce

In determining whether a statute directly regulates interstate commerce, the Supreme Court has "emphasized that the 'practical effect' of a challenged statute is 'the critical inquiry[.]'" *S.D. Myers, Inc. v. City & Cnty. of S.F.,* 253 F.3d 461, 467 (9th Cir. 2001) (citing *Healy,* 491 U.S. at 336). A statute has the "practical effect" of regulating interstate commerce if it "control[s] conduct beyond the boundaries of the State." *Nat'l Collegiate Athletic Ass'n v. Miller,* 10 F.3d 633, 639 (9th Cir. 1993) (quoting *Healy,* 491 U.S.

at 336). Such statutes violate the Commerce Clause per se. *NCAA,* 10 F.3d at 639.

A law has the practical effect of controlling conduct beyond its borders if it requires individuals or entities who want to engage in business or conduct *entirely* outside of the regulating state to comply with the challenged statute. Such laws preclude a person or entity from simultaneously being in compliance with the statute and engaging in some activity in another state. *See, e.g., Healy,* 491 U.S. at (1989) ("Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce.") (internal citations and quotation marks omitted).

Thus, for example, in *NCAA v. Miller,* the Ninth Circuit struck down a Nevada statue that would have required the NCAA to conduct its enforcement proceedings against illegal recruitment practices according to Nevada law, even when both the practices and proceedings took place entirely outside of Nevada. *See NCAA,* 10 F.3d at 639. The Ninth Circuit explained:

> [I]f a university in state X ("U of X") engaged in illicit practices while recruiting a high school quarterback from state Y, the NCAA would have to conduct its enforcement proceeding according to Nevada law in order to maintain uniformity in its rules. . . . In this way, the Statue could control the regulation of the integrity of a product in interstate commerce that *occurs wholly outside Nevada's*

> *borders*. That sort of extraterritorial effect is forbidden by the Commerce Clause.

Id. (emphasis added).

Section 25982, by contrast, only bars the sale of products that are the "result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size" *in California*. It does not require an individual or business to choose between force feeding a bird in another state and complying with California law; a person or business can do both at the same time. *Accord Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson,* 48 F.3d 391, 392 (9th Cir. 1995) (upholding a Washington statute that required corporations to get a certificate from the state before collecting medical waste from Washington and hauling it to California); *Valley Bank of Nev.,* 914 F.2d at 1192 (upholding a statute that required out-of-state banks to impose and collect a fee on behalf of a Nevada bank from customers who withdrew cash from it because the customer "making an ATM withdrawal purchases the service while at the ATM in Nevada.").

Plaintiffs argue that "the practical effect of Section 25982 is to force out-of-state farmers to comply with the California legislature's illusory feedings standard – and thus directly regulate beyond the state's borders." Br. in Supp. 15. This argument mischaracterizes the focus of the "direct regulation" inquiry. The object is to ensure that state laws do not force businesses, like Plaintiffs, to face the Hobson's choice of engaging in an activity in one state and

violating the law at issue. Such an expansive interpretation of the term "direct regulation" would mean that virtually any regulation of local markets would violate the dormant Commerce Clause. For example, it would require courts to strike down a growing number of state laws that prohibit the manufacture, sale, or distribution of bottles or cups that contain bisphenol-A, a suspected carcinogen. See Cal. Health & Safety Code § 108940, Minn. Stat. Ann. § 325F.173, N.Y. Envtl. Conserv. Law § 37-0505.[5]

Thus, Plaintiffs have not raised a serious question that Section 25982 directly regulates interstate commerce.

4. Other Substantial Burdens on Interstate Commerce and *Pike* Balancing

Section 25982 therefore has only an "indirect effect[ ] on interstate commerce and regulates even-handedly." *Valley Bank of Nev.,* 914 F.2d at 1189.

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[5] Plaintiffs point to one case from the Eastern District of California in support of their interpretation of "direct regulation." In *Rocky Mountain Farmer Union v. Goldstene,* 843 F. Supp. 2d 1071 (E.D. Cal. 2011), the Court found that California's Low Carbon Fuel Standard (LCFS) directly regulated interstate commerce, and granted a preliminary injunction enjoining enforcement of the LCFS. However, the Ninth Circuit has stayed the enforcement of the preliminary injunction. *See* No. 12-1531 Dckt. 54. Moreover, the Court in *Rocky Mountain* also found that the LCFS discriminated against interstate commerce, which, as explained above, Section 25982 does not. *See Rocky Mountain,* F.Supp.2d at 1090.

Such regulations are only struck down if 1) they impose a substantial burden on interstate commerce; and, 2) the burden they impose is "'clearly excessive in relation to the putative local benefits.'" *S.D. Myers, Inc.,* 253 F.3d at 471 (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). If there is a legitimate local purpose, then the extent of the burden on interstate commerce that will be tolerated depends on both the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities. *Pac. Nw. Venison Producers v. Smitch,* 20 F.3d 1008, 1014 (9th Cir. 1994). In conducting this analysis, "the Supreme Court has frequently admonished that courts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation." *Id*. at 1017 (internal citations and quotation marks omitted). This fact-intensive inquiry requires the *Plaintiffs*, as the party challenging the statute, to "establish that the burdens that the regulation imposes on interstate commerce clearly outweigh the local benefits arising from it." *Kleenwell,* 48 F.3d at 399.

As a threshold manner [sic], Plaintiffs must establish that despite its non-discriminatory character, Section 25982 substantially burdens interstate commerce. *See Harris,* 682 F.3d at 1148, 1155, 1157. Plaintiffs have not raised a serious question that it will. Most laws that impose a substantial burden on interstate commerce do so because they are discriminatory. *See Harris,* 682 F.3d at 1148 (noting that a critical requirement for proving a violation of the dormant

Commerce Clause is that there must be a "*substantial burden on interstate commerce*" and that "[m]ost regulations that run afoul of the dormant Commerce Clause do so because of discrimination. . . ."). As discussed above, *see supra* Part IV.C.2, Section 25982 is not. Second, unlike the "small number" of non-discriminatory statutes that have run afoul of the dormant Commerce Clause, Section 25982 does not undermine a market that is "inherently national or require[s] a uniform system of regulation." *Id*. at 1148. *Cf. Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 522-23 (1959) (conflict in state laws governing truck mud flaps); *S. Pac. Co. v. Ariz. ex rel. Sullivan,* 325 U.S. 761, 763 (1945) (train lengths).[6]

Third, although Plaintiffs allege that Section 25982 will result in the loss of over $5 million in "interstate and foreign sales of wholesale foie gras and moulard duck products," Br. in Supp. 25, this

[6] Plaintiffs argue at length that the PPIA demonstrates that there is a "federal interest in national uniformity in the market for poultry products." Br. in Supp. 19, 19-22. However, the mere fact that Congress also regulates the poultry industry does not elevate the market for foie gras into an inherently national one that requires a uniform system of regulation. If that were the case, then the reach of the dormant Commerce Clause would be virtually limitless, extending to all areas in which Congress has articulated detailed regulations. Moreover, as noted above, Plaintiffs did not argue that Section 25982 is preempted in their motion for a preliminary injunction. *See supra* note 3.

figure overestimates Section 25982's impact.[7] The $5 million figure used by Plaintiffs includes both foie gras and "other moulard duck products"; however, as Plaintiffs' own declarations demonstrate, consumers of products other than foie gras, such Vandif Specialty Foods and Savory Gourmet, have found suitable replacements in the market. *See* Beylier Decl. ¶¶ 14-16, Vanden Broeder Decl. ¶ 8. Finally, as the Ninth Circuit recently held, a significant burden on interstate commerce does not exist "merely because a nondiscriminatory regulation precludes a preferred, more profitable method of operation in a retail market." *Harris,* 682 F.3d at 1154. Here, the evidence may

[7] In cursory fashion, Plaintiffs also argue that Section 25982 unconstitutionally burdens foreign commerce, citing to *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82 (1984). *See* Br. in Supp. 26. The plurality in *Wunnicke,* however, found the regulations at issue to be protectionist because they required "business operations to be performed in the home State that could more efficiently be performed elsewhere." *Id.* at 100. Section 25982 has no similar protectionist effect. Moreover, state laws that affect foreign commerce are only subject to additional scrutiny if they "impair uniformity in an area where federal uniformity is essential or implicate matters of concern to the whole nation. . . . such as the potential for international retaliation." *Smitch,* 20 F.3d at 1014 (internal citations and quotation marks omitted). Plaintiffs' general citations to the PPIA and foie gras's presence on the U.S.-Canada Harmonized Tariff Schedule are not enough to make the market for foie gras one in which "federal uniformity is *essential*" or one that implicates "matters of concern to the *whole* nation." Thus, it is appropriate to "analyze the burden on foreign commerce in the same manner [as] the burden on interstate commerce." *Id.*

show that Section 25982 only precludes a "more profitable method of operation" – force feeding birds for the purpose of enlarging its liver – rather than affecting the interstate flow of goods. If so, Section 25982 would not substantially burden interstate commerce, thus rendering it constitutional without having to engage in Pike balancing. *Id*.

Moreover, Plaintiffs have not raised a serious question that Section 25982's burden "clearly exceeds" its local benefits. It is worth reiterating that Plaintiffs must establish that Section 25982's burden on interstate commerce clearly exceed its local benefits, both at this early stage and should this case reach the merits. They have not done so here. Preventing animal cruelty in California is clearly a legitimate state interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 538 (1993); *see also United States v. Stevens,* 130 S.Ct. 1577, 1585 (2010) ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies."). The State has chosen to pursue this interest both by outlawing the actual practice of force-feeding birds for the purpose of enlarging their livers (Section 25981) and the sale of such products (Section 25982), and Plaintiffs have presented no evidence that Section 25982 is an ineffective means of advancing that goal. Furthermore, the only alternative Plaintiffs offer to Section 25982 is the passage of a statewide resolution in which California would "express its disfavor for particular farming practices." Br. in Supp. 26. This

option, at least at first blush, appears to do little to advance California's interest in preventing animal cruelty. Plaintiffs have thus failed to raise a serious question that Section 25982's burden on interstate commerce "clearly exceeds" its local benefits.

V. BALANCING OF THE EQUITIES AND THE PUBLIC INTEREST

Moreover, Plaintiffs have not carried their burden of demonstrating that the balance of equities tip *sharply* in their favor. Plaintiffs argue that while they are losing $360,000 a month in sales – losses they will be unable to recover due to the State's Eleventh Amendment immunity – the State "suffer[s] no real consequence from an injunction." Br. in Supp. at 28. Plaintiffs point to the fact that they are not challenging Section 25981, which bars the force-feeding of birds in California, and thus claim that the State "cannot claim that [it] – let alone any duck in California – will suffer any hardship as a result of a preliminary injunction[ ]" of Section 25982. Br. in Supp.28-29.

Even assuming that the State's only legitimate interest is preventing the force-feeding of birds in California, Plaintiffs overestimate the harm that Section 25982 is causing them while underestimating the harm granting an injunction would impose on the State. As discussed above, the $360,000 a month figure is likely greater than the actual impact Section 25982 is having because it includes duck products

other than foie gras that are readily available in the market. Moreover, although Section 25981 does bar the actual practice of force-feeding birds in California, Section 25982 provides an additional deterrent to California-based force feeders by banning the sale of these products.

More importantly, the public's interest does not weigh in favor of granting a preliminary injunction. There is a direct correlation between the economic losses imposed on Plaintiffs and other sellers by Section 25982 and the number of birds that will not be force-fed. Moreover, given that Plaintiffs are unlikely to succeed on the merits, Plaintiffs' argument that it is "'in the public interest to terminate the unconstitutional application' of a statute" is inapplicable. Br. in Supp. 29 (quoting *Levine v. Fair Political Practices Comm'n,* 222 F. Supp. 2d 1182, 1191 (E.D. Cal. 2002)).

VI. CONCLUSION

For the reasons put forward in this Order, Plaintiffs' motion for preliminary injunction is DENIED.

IT IS SO ORDERED.

DATED: September 28, 2012 /s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASSOCIATION DES ELEVEURS DE CANARDS ET D OIES DU QUEBEC, a Canadian nonprofit corporation; HVFG, LLC, a New York limited liability company; HOTS RESTAURANT GROUP. INC., a California corporation, Plaintiffs-Appellants, and GAUGE OUTFITTERS, INC., Plaintiff, v. KAMALA D. HARRIS, Attorney General; EDMUND G. BROWN, Jr., in his official capacity as Governor of California; THE STATE OF CALIFORNIA, Defendants-Appellees.	No. 12-56822 D.C. No. 2:12-cv-05735-SVW-RZ Central District of California, Los Angeles ORDER (Filed Jan. 27, 2014)

Before: PREGERSON and FISHER, Circuit Judges, and DANIEL, Senior District Judge.*

The panel has voted to deny the petition for rehearing. Judge Pregerson has voted to deny the

petition for rehearing en banc, and Judges Fisher and Daniel so recommend.

The full court was advised of the petition for rehearing en banc. No judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED. No further petitions will be entertained.

Amici's motion for leave to file an amicus brief opposing the petition for rehearing en banc is DENIED as moot.

CALIFORNIA HEALTH AND SAFETY CODE SECTIONS 25980-25984

25980. For purposes of this section, the following terms have the following meanings:

(a) A bird includes, but is not limited to, a duck or goose.

(b) Force feeding a bird means 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.

25981. A person may not force feed a bird for the purpose of enlarging the bird's liver beyond normal size, or hire another person to do so.

25982. 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.

25983. (a) A peace officer, officer of a humane society as qualified under Section 14502 or 14503 of the Corporations Code, or officer of an animal control or animal regulation department of a public agency, as qualified under Section 830.9 of the Penal Code, may issue a citation to a person or entity that violates this chapter.

(b) A citation issued under this section shall require the person cited to pay a civil penalty in an amount up to one thousand dollars ($1,000) for each violation, and up to one thousand dollars ($1,000) for each day the violation continues. The civil penalty shall be payable to the local agency initiating the proceedings to enforce this chapter to offset the costs to the agency related to court proceedings.

(c) A person or entity that violates this chapter may be prosecuted by the district attorney of the county in which the violation occurred, or by the city attorney of the city in which the violation occurred.

25984. (a) Sections 25980, 25981, 25982, and 25983 of this chapter shall become operative on July 1, 2012.

(b) (1) No civil or criminal cause of action shall arise on or after January 1, 2005, nor shall a pending action commenced prior to January 1, 2005, be pursued under any provision of law against a person or entity for engaging, prior to July 1, 2012, in any act prohibited by this chapter.

(2) The limited immunity from liability provided by this subdivision shall not extend to acts prohibited by this chapter that are committed on or after July 1, 2012.

(3) The protections afforded by this subdivision shall only apply to persons or entities who were engaged in, or controlled by persons or entities who were engaged in, agricultural practices that involved force feeding birds at the time of the enactment of this chapter.

(c) It is the express intention of the Legislature, by delaying the operative date of provisions of this chapter pursuant to subdivision (a) until July 1, 2012, to allow a seven and one-half year period for persons or entities engaged in agricultural practices that include raising and selling force fed birds to modify their business practices.