

The Poultry Products Inspection Act and California's Foie Gras Ban: An Analysis of the *Canards* Decision and Its Implications for California's Animal Agriculture Industry

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ABSTRACT

In 2012, California banned the sale of force-fed foie gras—the “fatty liver” of ducks and geese. Just three years later, a federal district court overturned that ban in Association des Éleveurs de Canards et d’Oies du Québec v. Harris (Canards). Animal rights activists decried the decision as a step backwards in ethical eating. Industry groups retorted that the Poultry Products Inspection Act (PPIA) required the ruling. From a distance, several commentators inquired: was foie gras worth the fuss?

This Note responds affirmatively. Section 467(e) of the PPIA prohibits states from imposing “ingredient requirements” that are “in addition to, or different than” those made under the PPIA. The Canards court construed that provision as expressly preempting California’s foie gras ban, which—unlike the PPIA—mandated that foie gras products come from non-force-fed ducks and geese.

This reasoning is problematic. By literally interpreting section 467(e), the Canards court failed to rigorously analyze whether California’s ban created an ingredient requirement within the meaning of the PPIA. A proper preemption analysis requires that

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contextual construction. Further, the PPIA’s purpose and legislative history suggest that section 467(e) should not be read as preempting California’s ban.

The Canards court’s reasoning might have dramatic implications. Because the Federal Meat Inspection Act and the Egg Products Inspection Act contain virtually identical preemption provisions, other courts could apply the Canards court’s logic to displace state laws providing for the humane treatment of cows, pigs, and egg-laying hens. In other words, Canards could broadly eviscerate states’ ability to regulate animal cruelty. As a consequence, the foie gras fight extends far beyond ducks and geese. It may affect the food we all eat.

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INTRODUCTION

In January 2015, a federal district court overturned California’s ban¹ (Sales Ban or the Ban) on selling force-fed foie gras. In its opinion, the *Canards* court quipped, “This action . . . touches upon a topic impacting gourmands’ stomachs and animal-rights activists’ hearts: foie gras.”² And yet, some food and agriculture experts argued that the verdict in *Canards* is “pretty much a nonissue.”³ Their dismissiveness may be well warranted. The number of broiler chickens that die “every single hour of every single day” dwarfs the number of birds killed annually for foie gras.⁴

And yet, there are two reasons why the *Canards* decision merits attention. First, reviewing the ruling provides an opportunity to thoroughly analyze the appropriate scope of the federal statutory architecture governing the domestic animal agriculture industry. In finding that the federal Poultry Products Inspection Act (PPIA or the Act)⁵ preempted the Sales Ban, the *Canards* court relied too heavily on a “functional approach” to statutory interpretation.⁶ In short, the court’s approach scrutinized the effect of the Ban, as opposed to the PPIA’s purpose and legislative history. As a consequence, the court overlooked the crucial interpretive question: whether the Ban imposed an “ingredient requirement” within the meaning of the PPIA. Had the court more fully considered that question, it likely would have upheld the Ban. Given that the State is appealing the district court’s decision, the Ninth Circuit is likely to revisit this issue.

Second, in the wake of *Canards*, industry groups seeking to defeat state-imposed animal welfare regulations will likely build their litigation strategies around the preemption doctrine. In finding that the PPIA displaced the Sales Ban, the *Canards* court failed to restrict the PPIA’s preemptive effect. Section 467(e) prevents states from imposing “ingredient requirements” that are “in addition to” or “different than” those under the PPIA. That same clause appears in both the Federal Meat Inspection Act (FMIA)⁷ and the Egg Products

1. CAL. HEALTH & SAFETY CODE § 25981 (West 2014).

2. Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris (*Canards*), 79 F. Supp. 3d 1136, 1138 (C.D. Cal. 2015).

3. Mark Bittman, *Let Them Eat Foie Gras*, N.Y. TIMES (Jan. 13, 2015), <http://www.nytimes.com/2015/01/14/opinion/let-them-eat-foie-gras.html> [http://perma.cc/85DC-ALMY].

4. *Id.*

5. 21 U.S.C. §§ 451–472 (2012).

6. *See Canards*, 79 F. Supp. 3d at 1146–47 (citing Nat’l Meat Ass’n v. Harris, 132 S. Ct. 965, 973 (2012)).

7. 21 U.S.C. §§ 601–695 (2012). Following the FMIA’s 1967 amendments, some courts began referring to the FMIA as the Federal Wholesome Meat Act (FWMA). *See, e.g.,* Armour & Co.

Inspection Act (EPIA).⁸ Under the *Canards* court's reasoning, those statutes would likely preempt state efforts requiring poultry, livestock, or egg producers to adopt humane treatment measures. Courts applying that reasoning might, as a consequence, displace state efforts at the intersection of animal welfare and public health, including limits on antibiotic use in farming. Thus, the outcome in *Canards* could be far reaching if other courts adopt its reasoning.

This Note proceeds in four parts. Part I discusses the preemption doctrine and the PPIA, including the PPIA's background, purpose, and key provisions. Part II introduces the Sales Ban, summarizes the procedural history of the *Canards* litigation, and highlights key aspects of the district court's decision. Part III argues that the Sales Ban does not impose an "ingredient requirement" within the meaning of the PPIA. In so doing, it interprets Congress's intent in view of the PPIA's statutory framework and its legislative history, and squares that intent with the applicable case law. Part IV explores the implications of the *Canards* decision for three other California industries: eggs, pigs, and antibiotics. It concludes that the approach to preemption in *Canards*, if widely adopted, could undermine animal welfare regulations in those industries.

I.

THE PREEMPTION DOCTRINE AND THE PPIA

As a means to assess the outcome in *Canards*, this Part briefly summarizes the preemption doctrine's central tenets, as well as the PPIA's background, purpose, and key provisions.

A. *The Preemption Doctrine*

The preemption doctrine arises from Article VI of the U.S. Constitution. That article provides: "[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁹ As a result, state laws that conflict with federal laws are "without effect."¹⁰ Congress's intent is dispositive in determining whether such a conflict exists.¹¹

Courts recognize two forms of preemption: express and implied. This Note focuses on the former. Express preemption exists if Congress communicates its preemptive intent through a statute's language.¹² Even if a federal statute contains an express preemption clause, courts still examine

v. Ball, 468 F.2d 76 *passim* (6th Cir. 1972). For purposes of consistency, this Note uses the term FMIA to refer to 21 U.S.C. §§ 1031–1056 (2012).

8. §§ 1031–1056.

9. U.S. CONST. art. VI, cl. 2.

10. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008).

11. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996).

12. *Id.* at 485; *Altria Grp.*, 555 U.S. at 76; *see also* *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (stating that state laws regulating commerce "must fall" when "Congress' command is explicitly stated in the statute's language").

Congress's intent to determine the scope of the preemptive clause.¹³ Congress's intent in turn dictates whether and to what extent the federal act displaces state law.

Courts typically begin a preemption analysis with a presumption against displacing the state statute.¹⁴ That presumption rests on the principle that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."¹⁵ That principle applies with "particular force" when the federal act encroaches into an area traditionally occupied by the states.¹⁶

That presumption applies equally in the area of animal welfare. In *United States v. Stevens*, the Supreme Court recognized that states have a legitimate interest in preventing animal cruelty.¹⁷ Indeed, before initially dismissing the plaintiffs' Commerce Clause claims in *Canards*, the Ninth Circuit noted that the Ban represented a valid means of safeguarding California's interest in protecting animal welfare.¹⁸ This preemption analysis therefore begins by presuming the Ban's constitutionality.

B. *The PPIA's Background and Purpose*

The PPIA is the principal federal statute governing poultry production in the United States. Prior to its passage in 1957, the U.S. Department of Agriculture (USDA) inspected for wholesomeness only about 25 percent of the nation's poultry supply.¹⁹ That inspection regime was, moreover, nonbinding. In other words, producers could continue selling poultry or poultry products that failed to meet the USDA's standards.²⁰

Following World War II, lawmakers saw a need to strengthen the USDA's lax inspection regime. Economic growth and a more active workforce increased consumer demand for dressed, ready-to-cook, and processed poultry products.²¹ Aggregate poultry consumption also rose dramatically. By 1950, Americans consumed more than six billion pounds of poultry each year.²²

13. *Altria Grp.*, 555 U.S. at 76.

14. *See id.* at 77; *see also* *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (assuming that "in areas of traditional state regulation . . . a federal statute has not supplanted state law unless Congress has made such intention 'clear and manifest'" (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995))).

15. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

16. *Altria Grp.*, 555 U.S. at 77.

17. 559 U.S. 460, 469 (2010) (providing that "the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies").

18. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 942–43 (9th Cir. 2013) (citing *United States v. Stevens*, 559 U.S. 460, 469 (2010)).

19. 103 CONG. REC. 11127 (1957).

20. *Id.* at 11122–23, 11127.

21. *Id.* at 11122–23; *FSIS History*, U.S. DEP'T AGRIC., <http://www.fsis.usda.gov/wps/portal/informational/aboutfsis/history/history> [<http://perma.cc/2Q7R-JHXL>] (last updated Mar. 24, 2014).

22. 103 CONG. REC. 11122–23.

Congress responded by passing the PPIA. Section 452 states the PPIA's purpose: to "provide for the inspection of poultry and poultry products and otherwise regulate the processing and distribution of such articles" and "to prevent the movement or sale in interstate or foreign commerce of . . . poultry products which are adulterated or misbranded."²³

C. *The PPIA's Key Provisions*

In its modern form, the PPIA contains three main provisions. First, the PPIA mandates federal inspection of all poultry and poultry products moving in interstate commerce and in major intrastate consuming areas.²⁴ More specifically, it authorizes the Secretary of Agriculture (the Secretary) to conduct postmortem "bird-by-bird" inspections and premortem inspections as necessary.²⁵ Second, it establishes federal standards governing sanitation, facilities, and best practices.²⁶ Third, it creates uniform federal labeling, packaging, and ingredient requirements.²⁷ For instance, the PPIA prohibits producers from selling poultry interstate that was not labeled in accordance with federal provisions.²⁸ In addition, the PPIA outlaws using a false or misleading label.²⁹

The PPIA enforces uniform federal labeling, packaging, and ingredient requirements through two discrete provisions: sections 457(b) and 467(e). Section 457(b) empowers the Secretary to prescribe federal standards for labeling, and "definitions and standards of identity or composition" wherever "necessary" to protect the public.³⁰

In practice, a "standard of identity" (SOI) or "composition" resembles a recipe.³¹ It prescribes three things: (1) "mandatory ingredients," which *must* be included in the food; (2) "optional ingredients," which *may* be included in the food; and (3) relative proportions of each ingredient.³² Once the Secretary creates an SOI, a food cannot be marketed under the same name as articulated in that SOI unless it complies with the Secretary's standards.³³ For instance, if a new brand of jerky fails to meet the USDA's SOI for "beef jerky," its manufacturer cannot market that jerky as "beef jerky." The USDA's authority to prescribe SOIs is integral to its ability to enforce the PPIA's misbranding

23. 21 U.S.C. § 452 (2012).

24. 103 CONG. REC. 11121.

25. *Id.* at 11114.

26. *Id.* at 11117.

27. *Id.*

28. *Id.*

29. *Id.*

30. 21 U.S.C. § 457(b) (2012).

31. Wesley E. Forte, *Definitions and Standards of Identity for Foods*, 14 UCLA L. REV. 796, 796–99 (1967).

32. *Id.*

33. Richard A. Merrill & Earl M. Collier Jr., *Like Mother Used to Make: An Analysis of FDA Food Standards of Identity*, 74 COLUM. L. REV. 561, 561–63 (1974).

provisions. Those provisions make it unlawful to sell products that are labeled in a false or misleading manner.³⁴

The USDA's product definition in its SOI for foie gras reads: "Goose liver and duck liver foie gras (fat liver) are obtained exclusively from specially fed and fattened geese and ducks."³⁵ Notably, that definition does not elaborate further on a required method for feeding or fattening the geese or ducks. In other words, it allows for the production of non-force-fed foie gras, so long as those geese and ducks are "specially fed and fattened."³⁶

The Secretary's SOI then categorizes foie gras products into three groups: (1) Group One Products, (2) Group Two Products, and (3) Group Three Products.³⁷ Those groupings are based on a product's minimum duck liver or goose liver content.³⁸ Group One Products consist of "Whole Goose" or "Whole Duck Foie Gras." For Group One Products, goose or duck liver foie gras are the only animal tissues present.³⁹

Group Two Products may be labeled "Goose Foie Gras [or] Duck Foie Gras," "Block of Duck" or "Block of Goose Foie Gras," or "Parfait of Duck" or "Parfait of Goose Foie Gras." Group Two Products must include at least 85 percent duck or goose liver foie gras.⁴⁰

Group Three Products comprise "Pate of Goose or Duck Liver, Galantine of Goose or Duck Liver, or Puree of Goose or Duck Liver." Group Three Products must contain a minimum of 50 percent duck or goose liver foie gras.⁴¹

In addition to section 457(b), section 467(e) facilitates the Secretary's exclusive authority over labeling, packaging, and ingredient requirements. Section 467(e) preempts state requirements that are "in addition to" or "different than" the Secretary's standards. Section 467(e) reads:

Marking, labeling, packaging, or ingredient requirements . . . in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any official establishment in accordance with the requirements under this chapter⁴²

34. 21 U.S.C. §§ 453, 467(c) (2012).

35. FOOD SAFETY & INSPECTION SERV., FOOD STANDARDS AND LABELING POLICY BOOK (2005). Those standards are based originally on a 1984 USDA policy memorandum. *See id.*

36. Rejecting a Commerce Clause challenge to California's Ban, the Ninth Circuit found that the plaintiffs' declarations failed to demonstrate that foie gras "may be produced only by force feeding." *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 949 (9th Cir. 2013). The Ninth Circuit also cited the district court's observation 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." *Id.*

37. *See* FOOD SAFETY & INSPECTION SERV., *supra* note 35.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. 21 U.S.C. § 467(e) (2012).

This section forms the basis for the *Canards* litigation.

II.

CALIFORNIA'S FOIE GRAS BAN AND THE *CANARDS* DECISION

This Part proceeds in three sections. First, it explains the content and context of California's ban. Second, it summarizes the procedural history of the *Canards* litigation, which informed the plaintiffs' preemption claims. Third, it highlights aspects of the district court's decision, paying particular attention to the court's preemption reasoning.

A. California's Foie Gras Ban

In September 2004, former California Governor Arnold Schwarzenegger signed Senate Bill 1520 (SB 1520) into law.⁴³ SB 1520 created a statutory scheme entitled "Force Fed Birds" and comprised of two parts.⁴⁴ The first part—the conduct ban—made it illegal to force-feed a bird to enlarge its liver beyond normal size.⁴⁵ The second part—the Sales Ban—prohibited selling foie gras products from force-fed birds.⁴⁶ Both parts defined "bird" to include ducks and geese and defined "force-feeding" as "a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily."⁴⁷ The bill also provided that "[f]orce feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into the bird's esophagus."⁴⁸ This force-feeding method is commonly referred to as "gavage."

Leading up to SB 1520's passage, animal welfare groups stressed that gavage is "cruel," "inhumane," and "destined to produce physiological suffering."⁴⁹ They argued that gavage harms birds in four ways.⁵⁰ First, gavage forces birds to consume a "severely deficient" diet that induces chronic liver disease.⁵¹ Second, use of a tube or funnel in gavage can bruise, burn, or perforate a bird's esophagus.⁵² Third, force-feeding and confinement impairs

43. See *California Foie Gras Ban: A Brief History of Anti-Foie Measures*, HUFFINGTON POST (June 29, 2012), http://www.huffingtonpost.com/2012/06/29/california-foie-gras-ban_n_1635542.html [<http://perma.cc/H2BK-DQ4G>].

44. CAL. HEALTH & SAFETY CODE §§ 25980–25984 (West 2014).

45. *Id.* § 25981. Plaintiffs in *Canards* "do not challenge the conduct ban, nor do they argue that the conduct ban applies to their force-feeding of birds outside of California." *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 79 F. Supp. 3d 1136, 1147 (C.D. Cal. 2015).

46. HEALTH & SAFETY § 25982.

47. *Id.* § 25980. Section 25980 also provides that the definition of "bird" is "not limited to . . . a duck or goose." *Id.*

48. *Id.*

49. Renee' L. Brooks, *Bill Analysis*, SB 1520 4, 9 (June 22, 2004), ftp://leginfo.ca.gov/pub/03-04/bill/sen/sb_1501-1550/sb_1520_cfa_20040620_183351_asm_comm.html [<http://perma.cc/A5NT-P8RN>].

50. *Id.* at 4, 6.

51. *Id.* at 9.

52. *Id.* at 4.

birds' respiratory, metabolic, and locomotive functions.⁵³ Fourth, gavage induces psychological stress that increases the risk of premature death.⁵⁴ As a consequence of the harm gavage causes, animal welfare advocates demanded that California lawmakers entirely ban gavage.

Industry groups responded with three arguments. First, they contended that gavage is natural and mimics the birds' natural feeding processes.⁵⁵ Second, they argued that force-fed goose and duck livers are safe to consume.⁵⁶ Finally, they claimed that SB 1520 could disrupt agriculture throughout the state.⁵⁷

Despite the industry's arguments, the California Assembly approved SB 1520 by a margin of forty-four to twenty-eight.⁵⁸ To provide flexibility for poultry producers, lawmakers included a phase-in provision that delayed SB 1520 from becoming law for seven and a half years.⁵⁹ Governor Schwarzenegger opined that the delay would allow domestic foie gras producers to find "a humane way" to market their products.⁶⁰

B. Plaintiffs' Initial Challenge in Canards

The day after the Ban took effect, Hot's Restaurant Group, Inc. and two foie gras producers—the Association des Éleveurs de Canards et d'Oies du Québec and HVGF, LLC (collectively plaintiffs)—filed a lawsuit to enjoin Attorney General Kamala Harris, Governor Edmund Brown, and the State of California (collectively the State) from enforcing the Ban.⁶¹ Plaintiffs argued that the Sales Ban was unconstitutional because it violated the Due Process Clause and the Commerce Clause of the U.S. Constitution.⁶² Plaintiffs filed a motion for a preliminary injunction, which the district court denied.⁶³ Plaintiffs timely appealed.⁶⁴

The Ninth Circuit affirmed the district court's denial of plaintiffs' motion for a preliminary injunction.⁶⁵ It turned first to plaintiffs' due process claim. Plaintiffs alleged that the Ban's force-feeding definition was unconstitutionally

53. *Id.* at 6.

54. *Id.*

55. *Id.* at 10.

56. *Id.*

57. *Id.*

58. Pam Runquist, *California Assembly Passes Bill to Ban Force Feeding of Ducks and Geese*, VIVA! USA (Aug. 24, 2004), <http://www.vivausa.org/newsreleases/8-24-04.htm> [<http://perma.cc/U72W-ZTRD>].

59. *California Foie Gras Ban*, *supra* note 43.

60. *Id.*

61. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 942–43 (9th Cir. 2013).

62. *Id.* at 943.

63. *Id.*

64. *Id.*

65. *Id.* at 953.

vague because it lacked “an identifiable measurement of exactly how much food a bird can be fed.”⁶⁶ Rejecting that argument, the court found that the statute’s plain language sufficiently defined “force-feeding.” In addition, the statute provided gavage as an example of an unlawful process.⁶⁷

The Ninth Circuit also upheld the Ban on Commerce Clause grounds.⁶⁸ Plaintiffs argued that the Sales Ban violated the Commerce Clause in several respects, including by (1) targeting out-of-state entities and (2) banning foie gras unless all farmers complied with California’s standards.⁶⁹ The Ninth Circuit rejected both arguments.

In rejecting plaintiffs’ first argument that the Sales Ban unconstitutionally discriminated against out-of-state entities, the Ninth Circuit stressed that a valid statute can have a disproportionate impact on out-of-state producers. The court noted that, in contrast, “discriminatory statutes *seek* economic protectionism and are ‘*designed* to benefit in-state economic interests by burdening out-of-state competitors.’”⁷⁰ The court subsequently upheld the Ban because it “treat[ed] all private companies exactly the same.”⁷¹

Dismissing plaintiffs’ second argument, the Ninth Circuit found that the Ban would not necessarily eliminate in-state foie gras production.⁷² More specifically, the court observed that plaintiffs’ declarations failed to demonstrate that foie gras could be produced only through force-feeding.⁷³ The court also distinguished plaintiffs’ principal case, *Schollenberger v. Pennsylvania*, in which the Supreme Court held that an “absolute prohibition of an unadulterated, healthy, and pure article” violated the Commerce Clause.⁷⁴ More specifically, the court juxtaposed the extensive federal framework governing the oleomargarine market in *Schollenberger* to the PPIA’s limited attention to foie gras. Based in part on these findings, the Ninth Circuit affirmed the denial of plaintiffs’ motion for a preliminary injunction.

C. Plaintiffs’ Preemption Cause of Action and the Canards Decision

Following their Ninth Circuit defeat, plaintiffs amended their complaint to include a preemption argument.⁷⁵ Plaintiffs’ express preemption claim

66. *Id.* at 946.

67. *Id.*

68. *Id.* at 947.

69. *Id.* at 949. Plaintiffs also argued that the Ban violated the Commerce Clause by controlling prices outside of California and resulting in conflicting legislation. The Ninth Circuit rejected those arguments as well. *Id.*

70. *Id.* at 948 (emphasis added) (citing Nat’l Ass’n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1148 (9th Cir. 2012)).

71. *See id.*

72. *Id.* at 949.

73. *Id.*

74. 171 U.S. 1, 13–14 (1898).

75. Second Amended Complaint at 4, Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris, 79 F. Supp. 3d 1136 (C.D. Cal. 2015) (No. 2:12-cv-05735-SVW-RZ). In addition to their

proceeded in three parts. First, plaintiffs noted that section 467(e) prohibits states from imposing labeling, packaging, or “ingredient requirements” that are “in addition to, or different than,” those made under the PPIA.⁷⁶ Second, they argued that the Sales Ban⁷⁷ violated section 467(e) by mandating that producers use “non-force-fed” bird livers to make foie gras.⁷⁸ In so arguing, plaintiffs highlighted that their products satisfied the USDA’s SOI for foie gras but violated California’s requirements.⁷⁹ Third, plaintiffs claimed that the Ban undermined Congress’s purpose in enacting the PPIA—namely, to streamline the national poultry market.⁸⁰ Over one month after amending their complaint, plaintiffs filed a motion for summary judgment.⁸¹

In its response, California disputed that the Sales Ban imposed an “ingredient requirement” on foie gras producers. Instead, it argued that the Ban merely regulated a “process” by prohibiting a “particular feeding method involving animal cruelty.”⁸² The State suggested that the USDA, in enforcing the PPIA’s misbranding provisions, would not equate two distinct feeding methods with two distinct ingredients.⁸³

The district court disagreed with the State’s reading of the Ban in two respects.⁸⁴ First, it determined that the Sales Ban imposed an “ingredient requirement” that—on its face—was “in addition to” or “different than” those under the PPIA. While the Ban effectively required that foie gras products come from “non-force-fed” birds, the PPIA had no such requirement.⁸⁵ Thus, the court agreed with plaintiffs’ theory, noting that plaintiffs’ force-fed foie gras products complied with all federal standards, including the Secretary’s foie gras SOI, and yet still violated the Ban.

Second, the court found that the Ban imposed an “ingredient requirement” under a “functional approach” to statutory interpretation.⁸⁶ The Supreme Court initially articulated that approach in *National Meat Association v. Harris*

express preemption claim, plaintiffs also argued that the PPIA impliedly preempted the Sales Ban. Because the district court rejected those arguments in granting Plaintiffs’ Motion for Summary Judgment, this Note does not address them further.

76. *Id.* at 4, 26–27.

77. *See California Foie Gras Ban*, *supra* note 43 (highlighting that the *Canards* plaintiffs did not challenge the conduct ban).

78. Second Amended Complaint, *supra* note 75, at 4, 26–27.

79. *Id.* at 4.

80. *Id.* at 27.

81. Plaintiffs’ Brief in Support of Motion for Summary Judgment on Federal Preemption Claim at 1, *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 79 F. Supp. 3d 1136 (C.D. Cal. 2015) (No. 2:12-cv-05735-SVW-RZ).

82. Attorney General’s Opposition to Plaintiffs’ Partial Summary Judgment Motion on Federal Preemption Claim at 12, *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 79 F. Supp. 3d 1136 (C.D. Cal. 2015) (No. 2:12-cv-05735-SVW-RZ).

83. *Id.* at 6.

84. *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 79 F. Supp. 3d 1136, 1145–48 (C.D. Cal. 2015).

85. *Id.* at 1145–46.

86. *Id.* at 1146–47.

(*National Meat*).⁸⁷ The *Canards* court acknowledged that, under a functional approach, the Ban might simply regulate a feeding method or “process.”⁸⁸ In other words, it accepted that the Ban might not impose an “ingredient requirement” on its face. But the court explained that the Ban’s practical effect would be the same: California would require producers to use a particular ingredient—non-force-fed duck or goose liver—in their foie gras.⁸⁹

Viewing the Ban in functional terms, the court expressed concern that states might adopt similar restrictions to circumvent the PPIA’s requirements: “any state would be able to avoid preemption of ingredient and labeling requirements by purporting to regulate the *process of producing an ingredient* rather than directly regulating the ingredient’s use.”⁹⁰ Thus, to avoid “making a mockery” of the PPIA, the court granted plaintiffs’ motion and permanently enjoined the State from enforcing the Ban.⁹¹

Despite its straightforward reasoning, the *Canards* court’s dual-pronged preemption approach is problematic because it overlooks Congress’s intent as embodied in the PPIA’s purpose and history. The Supreme Court has established that Congress’s intent should guide any preemption analysis.⁹² Even when express preemption is at issue, courts must consider the substance and scope of Congress’s intent.⁹³ This Note therefore seeks to determine the Ban’s validity by discerning Congress’s intent in using the phrase “ingredient requirements.”

III.

THE MEANING OF “INGREDIENT REQUIREMENT” IN THE CONTEXT OF THE PPIA

The PPIA preempts a state regulation if the latter imposes an “ingredient requirement” within the scope of the federal act. The *Canards* court did not adequately explore what Congress intended to include within its definition of “ingredient requirement.” This Part addresses that question and concludes that the Ban does not impose an “ingredient requirement” within the meaning of the PPIA.

This Part proceeds as follows. First, it construes section 467(e) in terms of the statutory text. Second, it discerns Congress’s intent in designing section 467(e) by analyzing the legislative history of the PPIA and its sister statutes.

87. 132 S. Ct. 965 (2012).

88. *Canards*, 79 F. Supp. 3d at 1146.

89. *Id.* at 1145–47.

90. *Id.* at 1146 (emphasis added).

91. *Id.* at 1147–48.

92. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996); *Nat’l Broiler Council v. Voss*, 44 F.3d 740, 742 (9th Cir. 1994).

93. See *Medtronic*, 518 U.S. at 485–86; *Am. Meat Inst. v. Ball (AMI)*, 424 F. Supp. 758, 763 (W.D. Mich. 1976) (finding that “in construing the [FMIA’s] definition of labeling itself, it is entirely appropriate to examine the Congressional intent and interpret the statutory language in light of the ‘evils sought to be remedied’ by the legislation”).

Third, it squares Congress's intent, as revealed by that legislative history, with the principal cases cited in *Canards*.

A. *The PPIA's Text*

The PPIA's text is the "best place to begin" for determining whether section 467(e) displaces the Ban.⁹⁴ And yet, the PPIA does not expressly define "ingredient requirement." The PPIA also does not use the phrase outside of section 467(e).

However, two other PPIA sections, sections 453 and 466, use the word "ingredient(s)."⁹⁵ Section 453 defines a "misbranded" poultry product as one that does not match the SOI prescribed by the Secretary, unless it (1) conforms to that standard, (2) is labeled accordingly, and (3) lists on the label "optional ingredients (other than spices, flavoring, and coloring) present in such food."⁹⁶

Based on this text, section 453's use of "ingredient" seems to include "spices, flavoring, and coloring"—elements that producers add to foodstuffs. Based on its context, that usage suggests that Congress intended the term "ingredient" to apply to a food's component parts and not the process by which a food is made. Congress's use of "ingredient" in section 453, a misbranding provision, also implies that lawmakers were chiefly concerned with poultry producers inserting harmful food additives without proper labeling into household products.

Under that reading, section 467(e) likely preempts states from creating minimum content requirements for foie gras that would contravene the Secretary's standards. For instance, section 467(e) would likely preempt a state law that allows manufacturers to add pork sausage into a product labeled "Whole Goose" or "Whole Duck Foie Gras" because pork is a nonsanctioned animal tissue.⁹⁷

Under that reading, section 467(e) would not, however, preempt state measures mandating more humane feeding methods for ducks and geese. Those measures take effect long before a producer decides to introduce additives, like spices, flavorings, and other colorings, to their foie gras products.⁹⁸ In sum,

94. *AMI*, 424 F. Supp. at 763; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (suggesting that courts should consider the statute's subject, context, and the authors' intent in discerning a disputed term's meaning).

95. Section 466 pertains to imports and provides in part:

No slaughtered poultry, or parts or products thereof, of any kind shall be imported into the United States unless they are healthful, wholesome, fit for human food, not adulterated, and contain no dye, chemical, preservative, or ingredient which renders them unhealthful, unwholesome, adulterated, or unfit for human food and unless they also comply with the rules and regulations made by the Secretary of Agriculture to assure that imported poultry or poultry products comply with the standards provided for in this chapter.

21 U.S.C. § 466(a) (2012).

96. *Id.* § 453(h).

97. See *supra* Part I.C.

98. § 453(h).

extending section 467(e)'s preemptive effect to husbandry practices is not contemplated anywhere in the PPIA's text. The PPIA's legislative history also belies that result.

B. *The PPIA's Legislative History*

Because the PPIA's text does not clearly define "ingredient requirements," a proper preemption analysis looks to the PPIA's legislative history and its surrounding statutory architecture to discern that term's meaning.⁹⁹ Those sources support an interpretation that would exclude poultry husbandry practices, including feeding methods, from the meaning of "ingredient requirements."

This Section is divided into two parts. First, it summarizes relevant provisions of the Federal Food, Drug, and Cosmetic Act (FDCA) and the FMIA, as Congress used both statutes as models for the PPIA. Second, it examines the PPIA's legislative history, including its 1968 amendments. That analysis reveals that Congress intended the PPIA to protect consumers and public health—not to preempt state-based animal welfare regulations. This Section concludes that the Ban does not create an "ingredient requirement" within the PPIA's meaning.

1. *The Federal Food, Drug, and Cosmetic Act*

The FDCA provides insight into Congress's intent to provide the Secretary of Agriculture with exclusive authority to prescribe uniform "standards of identity" for meat and poultry products, including for foie gras.¹⁰⁰ The FDCA thus also helps explain the role of section 467(e) in safeguarding that authority.

Before Congress empowered the USDA to create SOIs for meat and poultry products under the FMIA and PPIA, respectively, it provided that authority to the Federal Security Administrator under the FDCA.¹⁰¹ Indeed, the PPIA and FMIA's SOI provisions are identical "in substance and intent" to those promulgated in the FDCA.¹⁰²

The FDCA's legislative history, in turn, suggests that Congress granted the FDA SOI authority to prevent "economic adulteration."¹⁰³ In other words, Congress sought to discourage producers from swapping out expensive high-quality ingredients for cheaper ones.¹⁰⁴ Thus, implicit in the Secretary's SOI authority is the ability to require that certain products contain specific ingredients and exclude others. Federal agencies can subsequently ensure that

99. See *Altria Grp., Inc. v. Good*, 555 U.S. 70, 93 (2008).

100. *Armour & Co. v. Ball*, 468 F.2d 76, 80 (6th Cir. 1972).

101. *Id.*; *Fed. Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 232 (1943).

102. See *Armour*, 468 F.2d at 80.

103. *Quaker Oats Co.*, 318 U.S. at 230.

104. *Id.*

particular products meet public expectations, and can “promot[e] honesty and fair dealing in the interest of consumers.”¹⁰⁵

Reading section 467(e) in light of that legislative history, the PPIA likely preempts state measures materially conflicting with or adjusting the Secretary’s SOI for foie gras. The above pork sausage example provides but one illustration of an invalid state measure.¹⁰⁶ An animal husbandry regulation, on the other hand, would not implicate Congress’s underlying concern with economic adulteration: poultry regulations prescribing humane feeding methods take effect long before a manufacturer attempts to dupe consumers by swapping out high-quality ingredients for lower-quality ones.

There is, moreover, no proven quality difference between force-fed and non-force-fed foie gras.¹⁰⁷ While the parties in *Canards* have not extensively litigated this issue, non-force-fed foie gras exists.¹⁰⁸ While non-force-fed foie gras is likely more expensive to produce than force-fed foie gras, the PPIA evinces no express or implied concern with the foie gras industry’s economic competitiveness.¹⁰⁹

There is similarly scant evidence that Congress intended section 467(e) to protect the foie gras industry’s profits. Rather, Congress purposed that section, like that in the FDCA, to safeguard consumers from economic adulteration, or, put differently, producer-induced trickery and deceit.¹¹⁰ Requiring a particular animal husbandry practice would not undermine that objective. So understood, the Ban falls outside the PPIA’s meaning of “ingredient requirement.”

2. *The Federal Meat Inspection Act*

In 1906, Congress passed the FMIA to remedy the unsafe and unsanitary conditions then characterizing the nation’s slaughterhouses.¹¹¹ The FMIA primarily sought to protect consumers and preserve the public’s health.¹¹² To achieve those objectives, the FMIA mandated pre- and post-slaughter livestock

105. *Id.* at 228.

106. *See supra* Part III.A.

107. *See supra* note 36 (discussing the Ninth Circuit’s finding that producing foie gras does not necessarily require force feeding).

108. *See, e.g.,* Hank Shaw, *Ethical Foie Gras: No Force-Feeding Necessary*, ATLANTIC (Nov. 9 2010), <http://www.theatlantic.com/health/archive/2010/11/ethical-foie-gras-no-force-feeding-necessary/66261> [<http://perma.cc/U3SM-LWFZ>]; Jasper Copping & Graham Keeley, *‘Ethical’ Foie Gras from Naturally Greedy Geese*, TELEGRAPH (Feb. 18, 2007), <http://www.telegraph.co.uk/news/worldnews/1543031/Ethical-foie-gras-from-naturally-greedy-geese.html> [<http://perma.cc/J4ED-MPAW>].

109. Indeed, lawmakers’ comments during committee deliberations suggest that the opposite is true: economic concerns were subordinate to public health considerations. *See* 103 CONG. REC. 11143 (1957).

110. *See* *Armour & Co. v. Ball*, 468 F.2d 76, 80 (6th Cir. 1972).

111. JAMES F. NEALE & ANGELA SPIVEY, *FOOD SAFETY LAW* § 2.02 (2015).

112. *Celebrating 100 Years of FMIA*, FOOD SAFETY & INSPECTION SERV. (Feb. 21, 2014), http://www.fsis.usda.gov/wps/wcm/connect/fsis-content/fsis-questionable-content/celebrating-100-years-of-fmia/overview/ct_index [<http://perma.cc/PUW3-FH66>].

inspections.¹¹³ It also set explicit sanitary standards for slaughterhouses and empowered the USDA to issue grants of inspection.¹¹⁴

Congress amended the FMIA in 1967 to better achieve the FMIA's underlying objectives.¹¹⁵ Lawmakers perceived a "definite need" to improve state inspection programs to protect the public's health.¹¹⁶ More specifically, Congress feared new food additives and technologies might allow companies to deceive consumers: "[a]long with the high-speed equipment and use of frozen meat have come chemical and other 'fast' curing processes, artificial tenderizing, artificial smoking, coloring agents, and other additives that are potentially deceptive or dangerous to one's health when their use is not regulated."¹¹⁷

As a result of these concerns, lawmakers added two related provisions to the FMIA. First, Congress enabled the Secretary to prescribe marking and labeling requirements and "standards of identity" for meat products.¹¹⁸ Lawmakers noted that this would bring the FMIA into conformity with the FDCA and eliminate "complicated and conflicting" state-based labeling requirements.¹¹⁹

Congress also introduced a second section to the FMIA that preempted states from creating packaging, labeling, and ingredient requirements that were "in addition to" or "different than" standards existing under that act.¹²⁰ As amended, the FMIA became the Federal Wholesome Meat Act (FWMA).¹²¹ Those new provisions would later serve as a model for incorporating virtually identical language into the PPIA.¹²²

3. *Enacting the PPIA: Discerning Congress's Intent*

Congress intended the FMIA to serve as a basis for enacting the PPIA. Indeed, the PPIA's legislative history confirms that Congress designed that statute to closely resemble its meat-concerned counterpart. For instance, one lawmaker stated:

It seems to me a very simple thing to say that we should have the same kind of governmental protection of the public to safeguard it from the marketing of diseased and unwholesome poultry, that for four decades has safeguarded it from the marketing of diseased or adulterated

113. *Id.*

114. *Id.*

115. H.R. REP. NO. 90-653, at 5 (1967).

116. *Id.*

117. *Id.* at 15.

118. *Id.* at 18.

119. *Id.* at 19.

120. *Id.* at 27-28.

121. *Armour & Co. v. Ball*, 468 F.2d 76, 77 (6th Cir. 1972).

122. *Id.* at 85 (noting that "[t]he [PPIA's 1968] amendment added the precise preemptive language of Section 678 of the Federal Wholesome Meat Act").

meat. . . . *We propose no innovation in principle.* Department of Agriculture inspection of meat-processing plants is well established.¹²³

As with the FMIA, Congress primarily intended the PPIA to protect consumers and public health.¹²⁴ In so doing, Congress sought to respond to both increased poultry consumption and the rising popularity of processed poultry products.¹²⁵ Notably, fears of poultry-related diseases and food poisoning dominated congressional deliberations over the PPIA.¹²⁶ Even the bill's opponents conceded that health and safety considerations trumped economic concerns, with one critic stating: “[O]f course, *no one wants to do anything other than protect the safety and health and welfare of the American people*, but I think there are other considerations that ought to be taken into account along with that.”¹²⁷

In contrast, lawmakers drafting the PPIA were silent on the issue of animal welfare. Committee deliberations avoided the issue entirely. While almost eighty stakeholder groups appeared in support of the PPIA's passage, not a single animal welfare organization testified or issued a statement.¹²⁸ Some senators expressly confirmed that human health concerns represented the PPIA's sole justification.¹²⁹ For instance, one lawmaker stated that “[i]t seems to me the *only justification* for this bill would be the protection of the health and welfare of the people.”¹³⁰ The early history of the PPIA thus suggests that Congress did not intend the PPIA to regulate animal welfare.

4. Reinforcing the PPIA's Original Objectives: 1968 Amendments

Just one year after amending the FMIA, Congress readdressed the PPIA.¹³¹ In so doing, lawmakers sought to fill gaps in the PPIA's original coverage.¹³² Chief among those gaps was the PPIA's failure to regulate poultry shipped entirely intrastate.¹³³ Because of that loophole, the federal government

123. 103 CONG. REC. 11143 (1957) (emphasis added).

124. *Id.* at 11124, 11133.

125. *See id.* at 11120.

126. *Id.* at 11121. For instance, lawmakers cited scientific testimony before the Committee on Agriculture that twenty-six diseases were communicable from poultry to humans. They also cited reports suggesting that poultry or poultry products caused nearly 36 percent of domestic food poisoning incidents. *Id.*

127. *Id.* at 11111 (emphasis added).

128. *See id.* at 11118, 11120 (“[A] sincere effort was made to enable all parties having an interest in this legislation to be heard. As the record reveals, there were more than 70 witnesses who presented either testimony or statements. Testimony and/or statements were presented by 34 groups representing the poultry industry, 16 health officers, 12 representatives of labor unions, 6 general consumer organizations, representatives, and members of the major farm organizations—all of these supported some type of compulsory poultry inspection.”).

129. *Id.*

130. *Id.* at 11112 (emphasis added).

131. H.R. REP. NO. 90-1333, at 2 (1968).

132. *Id.* at 2–3.

133. *See id.* at 16.

failed to inspect approximately 1.6 billion pounds of poultry, or 13 percent of the nation's poultry supply.¹³⁴ Most states, moreover, did not maintain their own inspection programs.¹³⁵ Even those states that did voluntarily inspect poultry enforced their programs irregularly and unevenly.¹³⁶

In amending the PPIA, lawmakers sought to expand the Secretary's power to administer and enforce the PPIA. As with the FMIA's analogous 1967 amendments, Congress included a provision empowering the Secretary to create uniform federal marking and labeling requirements and "standards of identity or composition."¹³⁷ Congress also incorporated section 467(e) at this time.¹³⁸ Lawmakers justified these new provisions in terms of the PPIA's consumer protection and public safety objectives:

Under the proposal . . . States would be precluded from imposing additional or different labeling or packing or ingredient requirements for federally inspected products. Both industry and consumers would benefit from these changes—greater uniformity of labeling requirements—elimination of opportunities for fraud and deceit—as a result of these proposals—would greatly enhance the marketing of poultry and poultry products.¹³⁹

Acknowledging those goals upon signing the amended PPIA, President Lyndon Johnson remarked: "[D]irty plants will have to clean up or close down."¹⁴⁰

In sum, the legislative history suggests that the PPIA does not preempt the Ban. Both the PPIA and the FMIA, upon which the PPIA was based, sought primarily to protect consumers and safeguard public health. Lawmakers, moreover, notably overlooked animal welfare in passing and amending the PPIA and FMIA. Congress's attention implies that lawmakers did not intend for section 467(e) to displace animal welfare laws.¹⁴¹ That finding also squares with the apposite case law.

134. See *id.* at 3; see also *Amend the Poultry Products Inspection Act: Hearing on H.R. 14741, H.R. 9014782, H.R. 15146, H.R. 15154, H.R. 15361, H.R. 15484, H.R. 15504, H.R. 15622, and H.R. 15684 Before the Subcomm. on Livestock and Grains of the Comm. on Agric., 90th Cong. 63* (1968) (statement of Cong. Rep. William V. Roth, Jr., Delaware) (providing that, as a consequence of inadequate state attention, "[m]ost poultry moving in intrastate commerce receives little or no inspection") [PPIA Amendment Hearing].

135. *PPIA Amendment Hearing*, *supra* note 134.

136. *Id.*

137. H.R. Rep. No. 90-1333, at 23.

138. *Id.* at 28, 50–51.

139. *Id.* at 18.

140. Lyndon B. Johnson, *Statement by the President Upon Signing the Wholesome Poultry Products Act, Aug. 19, 1968*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29084> [<http://perma.cc/G2TT-HYWL>] (last visited Oct. 15, 2015).

141. See *supra* Part I.A.

C. *Judicial Treatment of the PPIA's & FMIA's Preemption Provisions*

In discerning the meaning of “ingredient requirement” within the context of section 467(e), the *Canards* court dealt largely with a question of first impression. And yet, several judicial precedents shed light on the best interpretation of that phrase. For instance, *American Meat Institute v. Ball* (*AMI*) provides a conceptually useful and factually analogous opinion that the parties in *Canards* overlooked.¹⁴² In addition, *Armour & Co. v. Ball* (*Armour*) and *National Meat Association v. Harris* (*National Meat*) favor a finding that the PPIA does *not* preempt the Ban—in contrast to the suggestion of the *Canards* plaintiffs.¹⁴³ That finding is consistent with other circuits’ interpretations of the FMIA.

Each of this Section’s four parts discusses a particular case. The first part explores the analytical framework employed by the court in *AMI*. The second and third parts contend that *Armour* and *National Meat*, respectively, actually support upholding the Ban. The fourth part argues that the Fifth and Seventh Circuits’ reasoning, as applied in *Empacadora de Carnes de Fresnillo* (*Empacadora*) and *Cavel* (collectively, the horse slaughtering ban cases), also validates a finding that the PPIA does not preempt the Ban.¹⁴⁴

1. *American Meat Institute v. Ball*

AMI provides a particularly useful analytical framework for determining the PPIA’s scope. Like the PPIA, the FMIA contains a preemption provision that prevents states from imposing labeling and ingredient requirements that are “in addition to” or “different than” those established under the FMIA.¹⁴⁵

In *AMI*, the district court considered whether the FMIA’s analogous preemption provision displaced one section of the Michigan Comminuted Meat Law (MCML) that concerned the “labeling” of meat products (notice requirement). More specifically, the MCML’s notice requirement obligated retailers to inform consumers that Michigan maintained more stringent “minimum ingredient requirements” for meat products than did the federal government.¹⁴⁶ In practice, this meant that when a Michigan grocer or restaurateur sold or served meats in Michigan that did *not* meet the state’s ingredient requirements, the MCML required them to “post a red-on-yellow notice of prescribed size, stating: ‘[t]he following products do not meet Michigan’s high meat ingredient standards but do meet the lower federal

142. 424 F. Supp. 758 (W.D. Mich. 1976).

143. *Armour & Co. v. Ball*, 468 F.2d 76, 77 (6th Cir. 1972); *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965, 965–66 (2012).

144. *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326, 326 (5th Cir. 2007); *Cavel Int’l, Inc. v. Madigan*, 500 F.3d 551, 551 (7th Cir. 2007).

145. *AMI*, 424 F. Supp. At 761–62 (W.D. Mich. 1976).

146. *Id.* at 760.

standards.”¹⁴⁷ The MCML also required grocers and restaurateurs to post that message on a placard “clearly visible to a consumer.”¹⁴⁸

The plaintiffs in *AMI* challenged the MCML’s notice requirement on the ground that it imposed a “labeling requirement” that was “in addition to” or “different than” those established under the FMIA.¹⁴⁹ Thus, the primary question before the *AMI* court was whether the MCML’s notice requirement constituted “labeling” within the meaning of the FMIA.¹⁵⁰ If it did, the FMIA’s preemption provision would displace Michigan’s notice requirement.¹⁵¹ The court held that the FMIA did not preempt the MCML.

In finding that the MCML’s notice requirement was not “labeling” within the meaning of the FMIA, the *AMI* court relied primarily on the FMIA’s legislative history.¹⁵² More specifically, the court stressed that (1) the FMIA’s overall policy “*is above all to protect the health and welfare of consumers*”; and (2) Congress intended the specific labeling provision at issue to achieve that same goal.¹⁵³ In addition, the court noted that (1) the MCML furthered the FMIA’s objectives by providing consumers with more accurate information; (2) Michigan possessed a “strong and legitimate state interest in consumer education and protection” that the notice requirement helped achieve; and (3) the MCML was presumed constitutional because of the presumption against preemption.¹⁵⁴ As a result, the court concluded:

I can find no basis for straining the statutory language to encompass the factual situation presented by the Michigan notice requirement.¹⁵⁵

The term “labeling” has a meaning derived from the purposes of the legislation and inseparable from the history which gave rise to its definition. Plaintiff’s attempt to redefine the word “label” in order to make it fit the facts of this case is not only unsupported by, but is contrary to, the Congressional intent and cannot be sustained by this court.¹⁵⁶

The court accordingly construed Michigan’s “notice requirement” as outside the FMIA’s scope and upheld it.

147. *Id.* at 763.

148. *Id.*

149. *Id.* at 761–62.

150. *Id.*

151. *Id.*

152. *Id.* at 762. The FMIA defines “labeling” as “all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.” 21 U.S.C. § 601(p) (2012); *AMI*, 424 F. Supp. at 766–67.

153. *AMI*, 424 F. Supp. at 762, 766–67 (citing *G. A. Portello & Co. v. Butz*, 345 F. Supp. 1204, 1208 (D.C. Cir. 1972)).

154. *Id.*

155. *Id.* at 767 (citing *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257–58 (1931)).

156. *Id.*

If this reasoning were applied to *Canards*, the Ban would also fall outside the federal statute's scope. Congress lifted section 467(e) directly from the FMIA.¹⁵⁷ As with the FMIA and its "labeling and ingredient requirements" preemption provision, Congress intended both the PPIA and section 467(e) to protect consumers and public health.¹⁵⁸ Nothing in the PPIA's language, legislative history, or purpose suggests that Congress intended the Act to regulate humane methods for feeding birds.¹⁵⁹ In addition, no material conflict exists between the PPIA and the Ban. As in *AMI*, the federal statute thus would not preempt the state law.

In *Canards*, neither the court nor the parties recognized *AMI*'s potential relevance. The *Canards* court further compounded this error by predicating its holding on two cases, *Armour* and *National Meat*, which actually support a finding that the PPIA does not preempt the Ban.

2. *Armour & Co. v. Ball*

Although *Canards* cited *Armour* to support its preemption finding, a careful application of *Armour*'s analysis leads to the opposite conclusion.

In *Armour*, the Sixth Circuit considered whether the FMIA displaced other sections of the MCML that imposed more stringent minimum "ingredient requirements" for meat products.¹⁶⁰ For instance, the FMIA allowed manufacturers to include in their products a number of animal parts prohibited under the MCML, such as hearts, tongues, stomachs, ears, and spleens.¹⁶¹ The Sixth Circuit found that Michigan's minimum content standards were "ingredient requirements" within the FMIA's meaning.¹⁶² As a result, the FMIA preempted those parts of the MCML.¹⁶³

The Sixth Circuit took two crucial steps in finding that the FMIA preempted the MCML. First, it read "ingredient requirements" as functionally equivalent to "standards of identity."¹⁶⁴ Second, the court compared the MCML's minimum content requirements to the Secretary's SOI for Grade 1 sausage.¹⁶⁵ In conducting that "item-by-item comparison," it found that the Secretary's SOI conflicted "in many material instances" with the MCML's specifications.¹⁶⁶

That material conflict was central to the *Armour* court's reasoning. For instance, the Secretary's SOI permitted manufacturers to fill a product labeled

157. See 21 U.S.C. § 466 (2012).

158. See *supra* Part II.C.

159. See *id.*

160. *Armour & Co. v. Ball*, 468 F.2d 76, 83–84 (6th Cir. 1972).

161. *AMI*, 424 F. Supp. at 760.

162. *Armour*, 468 F.2d at 85.

163. *Id.*

164. *Id.* at 81.

165. *Id.* at 81–82.

166. *Id.*

“Cooked, Smoked Sausage” with, at most, 15 percent poultry meat or poultry product. In contrast, the MCML did not permit manufacturers to put any poultry meat or poultry product in “Cooked, Smoked Sausage.”¹⁶⁷ The MCML also required Grade 1 sausage to contain a “protein content” of 12 percent.¹⁶⁸ The FMIA, in contrast, was silent on that question.¹⁶⁹ Because “nearly all provisions” of the MCML conflicted with “corresponding provisions” enacted under the FMIA, the court held that the FMIA preempted the state statute.¹⁷⁰

To distinguish *Armour* from *Canards*, a reviewing court need only replicate *Armour*’s item-by-item comparison. Unlike the FMIA and the MCML, the Secretary’s SOI for foie gras and the Ban are consistent. The Secretary’s definition of foie gras indicates that “[g]oose liver and duck liver foie gras (fat liver) are obtained exclusively from specially fed and fattened geese and ducks.”¹⁷¹ But that definition does not elaborate on a method for feeding or fattening geese or ducks used for foie gras. In other words, the Secretary’s SOI allows for the production of non-force-fed foie gras.¹⁷² What is more, non-force-fed foie gras can still be “specially fed.” For instance:

There is a Spanish producer, Pateria de Sousa, that makes an exquisite foie without gavage by laying out lots and lots of figs, acorns, lupini beans, and olives for their geese to eat in fall. The Spanish foie is not as large as French force-fed foie, but it did win a blind taste test in France in 2006. De Sousa’s foie has become the darling of the food world.¹⁷³

While the parties in *Canards* have not litigated the precise meaning of “specially fed,” this particular production method seems to meet the Secretary’s standard.

Unlike the MCML, the Sales Ban is therefore facially consistent with the Secretary’s requirements for foie gras. California maintains the same content requirements for all foie gras products. Indeed, the Sales Ban only makes one source of foie gras products illegal: those products coming from force-fed birds.¹⁷⁴ So while the Sales Ban does impose a condition on producers regarding the product’s source, that condition is not one that materially conflicts with the Secretary’s SOI. Thus, even under *Armour*’s logic, the Sales Ban does not impose an “ingredient requirement” within the meaning of the PPIA.

167. *Id.* at 81.

168. *Id.* at 82.

169. *Id.*

170. *Id.* at 82, 85.

171. FOOD SAFETY & INSPECTION SERV., *supra* note 35. These standards are based originally on a 1984 USDA policy memorandum. *See id.*

172. *See supra* notes 35–36, 108 (discussing available methods for producing non-force-fed foie gras).

173. *See Shaw, supra* note 108.

174. CAL. HEALTH & SAFETY CODE § 25982 (West 2014).

3. National Meat Association v. Harris

In addition to *Armour*, *Canards* partly relied on the Supreme Court's reasoning in *National Meat*.¹⁷⁵ In *National Meat*, the Court held that the FMIA preempted a California law that prevented slaughterhouses from selling the meat of nonambulatory pigs.¹⁷⁶ The particular FMIA preemption clause at issue in *National Meat* prevented states from imposing additional or different requirements that concern a slaughterhouse's facilities or operations.¹⁷⁷ As with the Ban in *Canards*, a conduct ban accompanied California's ban on selling nonambulatory pig meat.¹⁷⁸ That conduct ban prevented slaughterhouses from butchering nonambulatory animals.¹⁷⁹

Notably, the *National Meat* Court used a "functional approach" to statutory interpretation to invalidate California's ban on selling and processing nonambulatory pig meat.¹⁸⁰ In so doing, the Court highlighted that California's ban functioned "as a command to slaughterhouses to structure their operations in the exact way the remainder of §599f [the statutory scheme as a whole] mandates."¹⁸¹ The Court accordingly reasoned that if the sales ban avoided the FMIA's preemption clause, then "any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved."¹⁸² The Court concluded that such a result "would make a mockery of the FMIA's preemption provision."¹⁸³

And yet, the *Canards* court acknowledged that *National Meat*'s application was "far from clear" because that case "considered a different portion of the preemption clause than the one here at issue."¹⁸⁴ The clause at issue in *National Meat*, unlike that in *Canards*, prevented states from imposing regulations with respect to "premises, facilities and operations" of covered establishments.¹⁸⁵ The disputed clause in *National Meat* therefore did not concern ingredient or labeling requirements.

Even still, the court concluded that if *National Meat* applied at all, it counseled in favor of finding that the PPIA preempted the Sales Ban.¹⁸⁶ More

175. Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965 (2012).

176. *Id.* at 968, 970.

177. 21 U.S.C. § 678 (2012).

178. As summarized in *Canards*, the California statute at issue in *National Meat* barred (1) selling or buying nonambulatory animals for human consumption, (2) producing meat for human consumption, and (3) selling meat for human consumption from nonambulatory animals. Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris, 79 F. Supp. 3d 1136, 1145–46 (C.D. Cal. 2015).

179. *Id.*

180. *Id.* at 1146–47.

181. *Nat'l Meat*, 132 S. Ct. at 973.

182. *Id.*

183. *Id.*

184. *Canards*, 79 F. Supp. 3d at 1146–47 (noting that "much of the Court's analysis does not apply to the case at bar").

185. 21 U.S.C. § 678 (2012).

186. See *Canards*, 79 F. Supp. 3d at 1136–37.

specifically, the *Canards* court noted that the Sales Ban would, like the ban in *National Meat*, allow states to circumvent the PPIA's "ingredient requirement" restrictions by "creatively phrasing its law in terms of the manner in which those ingredients were produced."¹⁸⁷

That reasoning was flawed in two respects. First, it overlooked *National Meat*'s FMIA specific analysis, including evidence of Congress's intent to regulate animal welfare through the FMIA.¹⁸⁸ For instance, the FMIA incorporates provisions of the 1958 Humane Methods of Slaughter Act (HMSA), which prescribes standards for the humane handling and treatment of livestock.¹⁸⁹ In contrast, Congress never amended the PPIA to include the HMSA's standards. Courts have, moreover, generally construed the HMSA's definition of "livestock" to exclude poultry.¹⁹⁰ Thus, unlike in *National Meat*, the *Canards* plaintiffs lacked evidence that Congress intended to regulate animal welfare through the PPIA.¹⁹¹

Second, *Canards* ignored the lack of facial conflict between the PPIA and the Ban. In *National Meat*, however, the Court stressed that the FMIA conflicted "at every turn" with California's nonambulatory pig ban.¹⁹² More specifically, the federal and state laws in *National Meat* directed slaughterhouses to handle nonambulatory pigs in different and contradictory ways. That material conflict was integral to the Court's finding that the FMIA preempted the ban:

The FMIA regulates slaughterhouses' handling and treatment of nonambulatory pigs from the moment of their delivery through the end of the meat production process. California's §599f endeavors to regulate the same thing, at the same time, in the same place—except by imposing different requirements. The FMIA expressly preempts such a state law.¹⁹³

In *Canards*, by contrast, no such material conflict exists. On its face, the Secretary's SOI for foie gras is consistent with California law.¹⁹⁴ That SOI mandates only that foie gras products (1) come from "specially fed" geese and ducks and (2) conform to the Secretary's minimum content requirements.¹⁹⁵ California law does not contravene these standards—it simply takes off the table one method of producing specially fed ducks and geese. There are,

187. *Id.* at 1147.

188. *Nat'l Meat*, 132 S. Ct. at 968–69, 974.

189. *Id.* at 974.

190. *See, e.g.,* *Levine v. Conner*, 540 F. Supp. 2d 1113, 1121 (N.D. Cal. 2008).

191. *See supra* Part II.C.

192. *Nat'l Meat*, 132 S. Ct. at 970 (emphasis added).

193. *Id.* at 975.

194. *See supra* Part II.A.

195. *Id.*

moreover, other possible methods of complying with the Secretary's requirement that foie gras be "specially fed."¹⁹⁶

Thus, the Sales Ban does not oblige producers to make or market foie gras in a manner that contradicts the Secretary's standards. Nor does the Ban impugn Congress's concerns regarding economic adulteration.¹⁹⁷ Rather, California's ban proscribes a particular husbandry practice that falls outside section 467(e)'s scope. To the extent that *National Meat* applies, that case supports an interpretation that the PPIA does not preempt the Ban. That interpretation aligns with other circuits' analyses of the FMIA's analogous function and purpose.

4. *The "Horse Slaughtering Ban" Cases*

Other circuits have read the FMIA's analogous language as consistent with state statutes banning the sale of particular types of meat. In *Empacadora de Carnes de Fresnillo v. Curry*, the Fifth Circuit considered whether the FMIA preempted a Texas law that prevented slaughterhouses from processing and selling horsemeat.¹⁹⁸ In finding that the FMIA did not preempt the Texas ban, the Fifth Circuit recognized that the FMIA "in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place."¹⁹⁹

More specifically, the Fifth Circuit found that the FMIA's relevant preemption provision concerned slaughterhouse operations—not access to horsemeat.²⁰⁰ It stressed:

[T]he FMIA's preemption clause is more naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use, matters Chapter 149 [the Texas ban] is entirely unconcerned with. Chapter 149 does not infringe upon the territory preserved for the federal government by the FMIA's preemption clause.²⁰¹

Because the *Empacadora* court found that the FMIA's preemption clause was unconcerned with the availability of horsemeat, that court upheld the Texas ban.

Using virtually identical reasoning months later, the Seventh Circuit found in *Cavel International, Inc. v. Madigan* that the FMIA did not preempt an Illinois ban on processing and selling horsemeat.²⁰² As in *Empacadora*, the *Cavel* court read Illinois's ban as outside the scope of the FMIA's

196. See *supra* notes 35–36, 108.

197. See *supra* Part III.B.3.

198. 476 F.3d 326, 328–29 (5th Cir. 2007). This preemption provision was the same provision at issue in *National Meat*. See *supra* Part III.C.3.

199. *Empacadora*, 476 F.3d at 333.

200. *Id.*

201. *Id.*

202. *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 553–54 (7th Cir. 2007).

slaughterhouse preemption provision.²⁰³ It too concluded that the FMIA was concerned with “inspecting premises at which meat is produced for human consumption, rather than with preserving the production of particular types of meat for people to eat.”²⁰⁴

The Seventh Circuit stressed, moreover, that it would be “untenable” to displace the Illinois ban when the law did not facially conflict with the FMIA: “Of course in a literal sense a state law that shuts down any ‘premises, facilities and operations of any establishment at which inspection is provided’ is ‘different’ from the federal requirements for such premises, but so literal a reading is untenable.”²⁰⁵ The court reasoned that “[i]f despite its title the Meat Inspection Act were intended to forbid states to shut down slaughterhouses, it would have to set forth standards and procedures for determining whether a particular slaughterhouse or class of slaughterhouses should be shut down; and it does not.”²⁰⁶

So too here. Section 467(e) seeks only to ensure that poultry is unadulterated, safe to consume, and correctly branded. Congress added that section based on public health concerns arising from processed foods and harmful additives.²⁰⁷ In short, lawmakers sought to prevent states from undercutting federal standards by imposing contradictory “ingredient requirements.”²⁰⁸ Those objectives are entirely apart from the principal concern animating the Ban: animal welfare.²⁰⁹ So while the Sales Ban certainly requires foie gras producers to do something that the PPIA does not—use non-force-fed birds—that requirement is far removed from the PPIA’s purpose and specific provisions.

As in *Cavel*, it would be “untenable” to displace the Ban simply because it literally imposes a “different” requirement than those included in the PPIA.²¹⁰ In *Cavel*, the state’s ban on horse slaughtering created a requirement that was literally distinct from any FMIA provision. Even still, the court read that difference to suggest that the state ban was merely beyond the scope of the FMIA’s preemption clause.²¹¹ A court reviewing *Canards* should do the same, given the PPIA’s purpose and legislative history.²¹² As in *Cavel*, if Congress desired particular methods for feeding poultry, it could easily have incorporated those standards and procedures into the PPIA.

203. *Id.*

204. *Id.* at 554 (citation omitted).

205. *Id.*

206. *Id.*

207. *See supra* Parts III.B.3–4.

208. *Id.*

209. *See supra* Part II.A.

210. *Cavel*, 500 F.3d at 554.

211. *Id.*

212. *See supra* Part III.B.

It is also troubling that neither the parties nor the court in *Canards* extensively discussed these precedents in relation to the undisturbed existence of SB 1520's conduct ban.²¹³ The plaintiffs in *Canards* did "not challenge the conduct ban, nor d[id] they argue that the conduct ban applie[d] to their force-feeding of birds outside of California."²¹⁴ And yet, California's conduct ban comports with the Fifth and Seventh Circuits' holdings in *Empacadora* and *Cavel*. Given the presumed constitutionality of California's conduct ban, it seems inconsistent to strike down the Sales Ban on preemption grounds.

There are two takeaways from the foregoing analysis of the PPIA's text, its legislative history, and judicial constructions. First, Congress did not intend for the PPIA to regulate poultry welfare, including methods of humanely producing foie gras. Second, there is no material conflict between the Secretary's foie gras standards and those imposed under California law. Hence, the PPIA should not displace the Ban, and a reviewing court should reverse the *Canards* court's preemption holding.

IV.

EXTENDING *CANARDS*'S LOGIC: THE IMPLICATIONS FOR CALIFORNIA'S ANIMAL AGRICULTURE INDUSTRY

The preemption approach articulated in *Canards* could be dangerous if other courts adopt it. More specifically, courts could employ that approach to read section 467(e), or the FMIA's analogous provision, as displacing any state law that prescribes methods for humanely treating poultry or livestock. That judicial construction would severely undercut, if not entirely gut, state authority to regulate cruelty in the animal agriculture industry. This Part explores the application of that preemptive approach in three areas: eggs, pigs, and antibiotics.

A. Eggs and California Assembly Bill 1437

Congress enacted the EPIA in 1970, and it closely resembles both the FMIA and the PPIA. Like its meat and poultry counterparts, the EPIA governs inspection and labeling for shell eggs and egg products.²¹⁵ By ensuring that eggs and egg products are "wholesome, otherwise not adulterated, and properly labeled and packaged," Congress intended the EPIA to protect consumer health and welfare.²¹⁶

In addition to sharing the FMIA and PPIA's consumer protection aims, the EPIA structurally resembles those statutes. For instance, the EPIA

213. See *California Foie Gras Ban*, *supra* note 43.

214. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 79 F. Supp. 3d 1136, 1147 (C.D. Cal. 2015).

215. NEALE & SPIVEY, *supra* note 111.

216. 21 U.S.C. § 1031 (2012).

incorporates a complex inspection regime,²¹⁷ requires affected establishments to implement sanitary practices established by the Secretary of Agriculture,²¹⁸ prohibits misbranded food from moving in commerce,²¹⁹ and forbids false or misleading labels and containers.²²⁰ What is more, the EPIA contains an analogous “ingredient requirement” preemption provision. That provision forbids states from imposing “[l]abeling, packaging, or ingredient requirements” for egg products processed at any official plant that are additional to or different than those prescribed by the EPIA.²²¹

As a result, the looming battle over eggs is likely to resemble the foie gras fight. In 2008, California voters approved Proposition 2 (Prop 2), a statewide ballot measure that criminalized confining or tethering a farmed animal “for all or the majority of the day, in a manner that prevents such animal from (a) lying down, standing up, and fully extending his or her limbs; and (b) turning around freely.”²²² Because Prop 2 applied only to in-state producers, California lawmakers passed Assembly Bill 1437 (AB 1437).²²³ That bill extended Prop 2’s requirements to out-of-state producers as well, mandating larger cages for any eggs sold in California.²²⁴

AB 1437 primarily seeks to create more humane housing conditions for egg-laying hens. Prior to its passage, egg producers typically provided hens with only sixty-seven square inches of floor space.²²⁵ Under AB 1437, in contrast, producers must give hens 116 square inches of floor space—almost double the industry standard.²²⁶ Without spending millions, most domestic egg producers cannot comply with AB 1437’s requirements.²²⁷

Soon after AB 1437 took effect on January 1, 2015, six states—Missouri, Nebraska, Oklahoma, Alabama, Kentucky, and Iowa—sued California in

217. *Id.* §§ 1034(e), 1036(a).

218. *Id.* § 1035.

219. *Id.* § 1037.

220. *Id.* § 1036(a)–(b).

221. *Id.* § 1052.

222. Pamela Vesilind, *Did the Dismissal of Missouri v. Harris Have an Unanticipated Effect?*, AGRIC. L. (Oct. 7, 2014, 5:45 PM), <http://aglaw.blogspot.com/2014/10/did-dismissal-of-missouri-v-harris-have.html> [<http://perma.cc/H6SZ-UUR2>].

223. *Id.*

224. *Id.*; Dan Flynn, *Despite Ruling, Midwest Egg Producers Unlikely to Give Up California Market Without a Fight*, FOOD SAFETY NEWS (Oct. 6, 2014), <http://www.foodsafetynews.com/2014/10/midwest-egg-producers-arent-going-to-give-up-california-market-without-a-fight/#.VV4n-1VViko> [<http://perma.cc/LV52-V2EY>].

225. Flynn, *supra* note 224.

226. *See id.*

227. Frank Morris, *States Fight California’s Chicken Cage Law. But It’s Really About Bacon*, NPR (Mar. 10, 2014, 12:55 PM), <http://www.npr.org/sections/thesalt/2014/03/07/286811197/poultry-farmers-to-fight-back-on-california-cage-free-egg-law> [<http://perma.cc/UL58-BGJT>].

Missouri v. Harris.²²⁸ The *Missouri* plaintiffs alleged that the EPIA expressly and implicitly preempted AB 1437.²²⁹ More specifically, they noted that “one of [the EPIA’s] express purposes ‘is to protect human health in connection with the consumption of shell eggs.’”²³⁰ The plaintiffs therefore argued that the EPIA preempted AB 1437, which sought to improve both the welfare of egg-laying hens and the health of human consumers through new cage standards.²³¹

The district court, however, did not evaluate the plaintiffs’ preemption arguments. Instead, it held that the plaintiffs, as states, lacked standing because they failed to allege interests apart from those of private parties.²³² The district court consequently dismissed the case.

But the egg fight is likely just beginning. The *Missouri* plaintiffs appealed the district court’s decision and can likely cure their standing defect by encouraging an industry group to intervene.²³³ Soon after the *Missouri* decision, one such group, the United Egg Producers (UEP) abandoned its Memorandum of Understanding with the Humane Society, in which the two organizations agreed to push for a new federal cage standard.²³⁴ If the UEP intervened on behalf of the original *Missouri* plaintiffs, the latter party could prove injury. For instance, a 2012 study estimated that compliance with AB 1437 would cost egg producers \$385 million.²³⁵

If a court reaches the merits in *Missouri*, the plaintiffs could use the *Canards* court’s reasoning to argue that the EPIA preempts AB 1437. More specifically, the *Missouri* plaintiffs could explain that the EPIA (1) contains the same preemptive language as the PPIA and the FMIA²³⁶ and (2) does not define the phrase “ingredient requirement.”²³⁷ Like California’s requirement that foie gras must come from “non-force-fed” birds, AB 1437 imposes a cage standard on egg producers that is absent from the EPIA. The plaintiffs could argue that AB 1437 consequently imposes an “ingredient requirement” that is “in addition to” or “different than” those imposed by the EPIA, and is therefore preempted.

The *Missouri* plaintiffs could also argue that a court should apply the *Canards* court’s functional preemption approach. In particular, the plaintiffs

228. *Missouri v. Harris*, No. 2:14-cv-00341-KJM-KJN, 2014 U.S. Dist. LEXIS 76305, at *4 (E.D. Cal. June 2, 2014). The plaintiffs also challenged California’s implementing regulation, title 3, section 1350 of the California Code of Regulations. *Id.* at *6.

229. *Id.* at *5.

230. *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1065 (E.D. Cal. 2014).

231. *Harris*, 2014 U.S. Dist. LEXIS 76305, at *2, *5.

232. *Harris*, 58 F. Supp. 3d at 1063.

233. *See supra* note 222.

234. Dudley W. Hoskins, *United Egg Producers Decline to Renew MOU with HSUS*, NAT’L ASS’N STATE DEP’T’S AGRIC. (Feb. 19, 2014), <http://www.nasda.org/News/24781.aspx> [<http://perma.cc/A973-WRGS>].

235. *See Flynn, supra* note 224.

236. 21 U.S.C. § 1052 (2012).

237. *See id.* §§ 1031–1056.

could contrast the EPIA's silence on cage size with AB 1437's requirement that egg producers use larger cages to house egg-laying hens. The plaintiffs would thus argue that AB 1437 has the same effect as the Ban: AB 1437 imposes an "ingredient requirement" on egg producers that circumvents the EPIA's restrictions.²³⁸ Under that functional approach, the EPIA would also preempt AB 1437.²³⁹

B. Pigs and Proposition 2

In addition to hens, the California legislature could also apply Prop 2's minimum space requirements to mandate larger holding pens for cows and pigs.²⁴⁰ In particular, some industry groups are concerned that California could pass a sales ban on pork produced using gestation crates—small pens used to immobilize pregnant breeding sows.²⁴¹

But the FMIA would likely preempt that law if courts apply the *Canards* court's approach to preemption. The FMIA's "ingredient requirement" preemption provision is virtually identical to section 467(e). As with the Sales Ban, a ban on the sale of pork produced using gestation crates would force producers to install bigger crates. That requirement is arguably an "ingredient requirement" that is "in addition to" or "different than" those imposed by the FMIA, as the FMIA is silent on minimum crate size. Under the *Canards* court's logic, the FMIA would preempt that ban.

Additionally, as the Court explained in *National Meat*, the FMIA specifically incorporates humane treatment standards governing livestock—unlike the PPIA.²⁴² As a result, a court is more likely to find that the FMIA preempts a gestation crate rule because it falls squarely within the FMIA's scope.²⁴³ And yet, *National Meat* did not deal with the FMIA's preemption provision concerning ingredient requirements.²⁴⁴ As a consequence, only an appellate decision affirming or reversing the *Canards* decision would squarely apply.

238. See *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 79 F. Supp. 3d 1136, 1144 (C.D. Cal. 2015); *supra* Part III.C.3.

239. There might be some room for California in *Missouri* to argue that AB 1437 falls outside the EPIA's scope because (1) the EPIA's preemption clause applies only "with respect to egg products processed at any official plant," and (2) AB 1437 applies before eggs reach "official plants." Under the *Canards* court's functional preemption approach, however, AB 1437's mere *effect* on egg products that are later processed at "official plants" might be enough to create an "ingredient requirement" within the EPIA's meaning. See § 1052.

240. See *Morris*, *supra* note 227.

241. *Id.*; Fabien Tepper, *The New Ethics of Eating*, CHRISTIAN SCI. MONITOR (Dec. 7, 2014), <http://www.csmonitor.com/USA/Society/2014/1207/The-new-ethics-of-eating> [<http://perma.cc/9SLQ-NX56>].

242. See *supra* Part III.C.3.

243. *Id.*

244. *Id.*

California, however, may be spared a parallel fight over pork. If past efforts are any indication, meat companies are more likely to embrace animal welfare reforms in lieu of litigation. For instance, the veal industry has undertaken policies that render it virtually crate-free.²⁴⁵ Smithfield Foods, the world's top-producing pork company, claims that it "has converted more than 70 percent to crate-free production systems for its company-owned breeding sows."²⁴⁶ While new state regulations may have stimulated those shifts, pressure from retailers is also a factor. More than sixty major food companies—including McDonald's and Costco—have pledged to stop buying pork from producers that use gestation crate systems.²⁴⁷ Still, the extension of the *Canards* court's reasoning could strip states of their ability to force further reforms.

C. Antibiotics

At another intersection of food and public health, industry groups are resisting limits on antibiotic use in animal agriculture.²⁴⁸ This conflict is occurring at both federal and state levels. While the Food and Drug Administration (FDA) enacted guidelines to "phase-out" antibiotic use in livestock, those standards (1) are entirely voluntary and (2) apply only to antibiotics used for "growth-promoting purposes."²⁴⁹ Thus, even livestock producers that comply with the guidelines can continue to use antibiotics to prevent disease.²⁵⁰

Opponents have criticized the lax FDA guidelines as too weak to combat the "prolific" use of antibiotics in animal agriculture.²⁵¹ Livestock now consume about 80 percent of all antibiotics in the United States.²⁵² Critics fear that this trend is contributing to antibiotic resistance in humans, which in turn makes particular diseases deadlier and more difficult to treat.²⁵³

245. Wayne Pacelle, *Fighting Extreme Farm Animal Confinement*, ORANGE COUNTY REG. (Feb. 6, 2015, 5:15 PM), <http://www.ocregister.com/articles/egg-650325-free-cage.html> [<http://perma.cc/95F3-8XW4>].

246. *Id.*

247. *Id.*

248. Amy Nordrum & Elizabeth Whitman, *Antibiotic Resistance: How Livestock Lobbyists and Drug Companies Hinder the US Fight Against Superbugs*, INT'L BUS. TIMES (Apr. 29, 2015, 12:44 PM), <http://www.ibtimes.com/antibiotic-resistance-how-livestock-lobbyists-drug-companies-hinder-us-fight-against-1901499> [<http://perma.cc/5QD2-HWPV>].

249. Joe Rubin, *Why Advocates Say Brown's Veto of Livestock Antibiotics Bill Is a Good Thing*, KQED (Oct. 2, 2014), <http://ww2.kqed.org/stateofhealth/2014/10/02/why-advocates-say-browns-veto-of-livestock-antibiotics-bill-is-a-good-thing> [<https://perma.cc/KWJ4-GQ3D>]; *Id.*; Ed Silverman, *California Gov. Vetoes Controversial Bill for Antibiotics in Livestock*, WALL ST. J. (Oct. 2, 2014, 12:42 PM), <http://blogs.wsj.com/pharmalot/2014/10/02/california-gov-vetoes-controversial-bill-for-antibiotics-in-livestock> [<http://perma.cc/DQL2-BYGQ>].

250. Rubin, *supra* note 249.

251. *Id.*

252. *Id.*

253. *Id.*

Antibiotic reformists have likewise attacked state-based proposals that parallel federal efforts. In October 2014, California Governor Jerry Brown vetoed a state bill that mirrored the FDA's voluntary guidelines.²⁵⁴ In so doing, Governor Brown explained that merely codifying the FDA's weak standards would stave off more aggressive reforms.²⁵⁵ He noted that most major livestock producers had already pledged to surpass the FDA's standards.²⁵⁶

Governor Brown's veto set the stage for more aggressive state-based restrictions on antibiotic use in agriculture. Indeed, in October 2015, the California legislature passed Senate Bill 27 (SB 27), which contains "the toughest restrictions yet on antibiotic use in the United States."²⁵⁷ SB 27's restrictions take effect in January 2018 and will ban the state's livestock producers from "using certain antibiotics for routine disease prevention and growth promotion."²⁵⁸

And yet, a court could nullify SB 27 by applying the *Canards* court's preemption approach. As in *Canards*, industry groups could argue that the FMIA, PPIA, and EPIA do not expressly prevent producers from using antibiotics to raise cows, pigs, and eggs. A bill restricting antibiotic use in animals would thus "make a mockery" of those statutes by forcing producers to raise their animals in the exact way the state desires: antibiotic-free.²⁵⁹ Under the preemption approach embraced in *Canards*, holding otherwise would allow any state to "avoid preemption of ingredient and labeling requirements by purporting to regulate the process of producing an ingredient rather than directly regulating the ingredient's use."²⁶⁰ The FMIA, PPIA, and EPIA would consequently preempt limits on antibiotic use in the meat, poultry, and egg industries, respectively.

That is troubling. Reformists, particularly in the antibiotics arena, have targeted states as laboratories for change.²⁶¹ As with climate change, California could take the lead on limiting agricultural antibiotics given the state's large population and position as a major agricultural economy.²⁶² Commentators

254. *Id.*

255. Silverman, *supra* note 249.

256. *Id.*

257. Julia Belluz, *California Enacted the Strictest Law Yet on Antibiotic Use in Farms*, VOX (Oct. 12, 2015, 10:25 AM), <http://www.vox.com/2015/10/10/9489849/california-antibiotic-resistance-sb27> [<http://perma.cc/H85K-4X4W>].

258. *Id.*

259. *See Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 79 F. Supp. 3d 1136, 1146 (C.D. Cal. 2015).

260. *See id.* Even without the *Canards* court's functional approach, however, industry groups may have a stronger preemption claim given that SB 27, like the federal statutes at issue, appears to be motivated by human health concerns. *See* Part III.B.

261. *See* Belluz, *supra* note 257.

262. *See id.*; *supra* Rubin note 249 (providing that California could take a "leading role" on antibiotic resistance and quoting a National Resource Defense Counsel representative who explains that "California has a long tradition of being a national model . . . [w]e've seen it in the past with climate change. We are a major agricultural state, and we have a big population.

have accordingly noted that SB 27 could “push other states to follow suit.”²⁶³ But if courts adopt a sweeping preemption approach, California may lose an opportunity to champion those reforms.

In short, the fate of statewide regulations governing eggs, pigs, and antibiotics could turn on whether future courts adopt the *Canards* court’s preemption reasoning. Should courts apply that approach, the FMIA, PPIA, and EPIA might have virtually unlimited preemptive effects. If, on the other hand, courts reject that approach in favor of considering whether the state statute imposes an “ingredient requirement” within the meaning of the relevant federal act, they are more likely to uphold state interventions designed to improve animal welfare.

CONCLUSION

The outcome in *Canards* merits attention for two key reasons. First, the district court failed to adequately address whether the Ban imposes an “ingredient requirement” within the meaning of the PPIA. Had the court considered the PPIA’s background, legislative history, and purpose, it likely would have upheld the Ban. Second, the *Canards* court’s preemption approach could provide industry groups with a silver-bullet strategy to defeat state statutes limiting their autonomy. Because the FMIA, PPIA, and EPIA contain analogous preemption provisions, courts could apply the *Canards* court’s approach to preempt state restrictions requiring humane treatment of livestock and poultry. The implications of the *Canards* case thus reach far further than foie gras. If other courts adopt its reasoning, that decision might affect the food we all eat.

If we change livestock production in California, then it becomes a significant model for the rest of the nation”).

263. See Belluz, *supra* note 257.

