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## Foie Gras Ban in California

Erica Williams Morris  
*Golden Gate University School of Law*

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## NOTE

## FOIE GRAS BAN IN CALIFORNIA

*ERICA WILLIAMS MORRIS\**

Section 25982 of the California Health and Safety Code was unsuccessfully challenged by one restaurant that served foie gras to customers for many years prior to the ban imposed by the statute. If the courts do not invalidate the statute, foie gras will be permanently banned in the state. The statute is unconstitutional, and if challenged correctly, the courts should so find. However, although foie gras production is very controversial, there are alternative methods that allow all interested parties have what they want: foie gras and happy birds.

## INTRODUCTION

*“There is no sincerer love than the love of food.”—George Bernard Shaw*

Shaw’s statement could be no closer to the truth than when applied to Californians and their love of foie gras. And it is not just Californians today who share in this adoration. In fact, foie gras, or fattened duck liver, has been a culinary delicacy for over five thousand years.<sup>1</sup> The ancient Egyptians discovered that geese and ducks overeat prior to migrating, and that this gorging produces highly desirable meat and naturally fattened livers. Because the meat and livers were so appealing to the Egyptians, they “took advantage of this natural process and began cultivating fattened geese through the practice of gavage,” or force-

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\* J.D. Candidate, May 2015, Golden Gate University School of Law. I would like to extend my gratitude to everyone who supported me in publishing this Note, including the GGU Law Review Board. Specifically, I would like to thank Professor J. Sylvester for all the assistance and mentorship I received.

<sup>1</sup> *Foie Gras and It’s* [sic] *Aristocratic History*, MIRE POIX USA CULINARY DELIGHTS, available at [www.enjoyfoiegras.com/info/facts\\_history.html](http://www.enjoyfoiegras.com/info/facts_history.html) (last visited Oct. 17, 2014).

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feeding.<sup>2</sup> This practice permeated the culture extensively; there are even ancient tombs that depict Egyptian servants force-feeding grains to geese.<sup>3</sup>

The popularity of gavage “spread from Egypt through the eastern Mediterranean, and there are historical references documented by the Greek poets Homer and Cratinus, dating back to the eighth and fifth century BC.”<sup>4</sup> The Romans focused their culinary attention on the fattened livers rather than the normal goose meat, even though it was traditionally considered that the fatty liver was simply a byproduct of goose-meat production. The Romans began what we now recognize as foie gras preparation.

Upon the fall of the Western Roman Empire, the “Ashkenazi Jews retained the knowledge of how to make foie gras, and the practice later become a staple of Jewish aristocrats in Palestine.”<sup>5</sup> The Jews carried with them their knowledge of fattening geese as they migrated across Europe into France, Germany, and finally along the Rhine. The Jews desired fatter geese primarily because they used goose fat in place of other fat for cooking. There is “a long trail of literary evidence beginning in eleventh century medieval Europe” linking the Jews to foie gras.<sup>6</sup>

Foie gras was likely brought to France earlier there are French foie gras recipes dating back to the sixteenth century, but it was not popularized until “the seventeenth century by chefs associated with the French Court.”<sup>7</sup> For example, in 1788, “the governor of Alsace traded a pate de foie gras [to] King Louis XVI for some real estate in Picardy. The Sun King was so enamored [with] the dish that he began introducing Strasbourg foie gras throughout Europe.”<sup>8</sup> This is how foie gras became associated with French food and culture as it is today, and it has increased in popularity ever since. In “the late nineteenth century, foie gras production in France became a thriving industry making France the uncontested champion of this unique and luxurious food.”<sup>9</sup>

Foie gras has continued to spread and has reached across the several states. Furthermore, it is this love of foie gras that has caused

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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Californians to race to the courts after the most beloved delicacy was banned from the state.

This Case Note analyzes the plaintiffs' actions in *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*.<sup>10</sup> Shortly after the operative date of Section 25982 of the California Health and Safety Code, which bans foie gras produced by force-feeding birds, a group of plaintiffs, including one restaurant that served foie gras to customers for many years prior to the ban, challenged the statute. The plaintiffs sought to prevent the enforcement of the statute, claiming that the statute violates the Due Process and Commerce Clauses of the U.S. Constitution.<sup>11</sup> The fate of foie gras producers and consumers was in the hands of the district court. The district court denied the plaintiffs' motion for a preliminary injunction, and the U.S. Court of Appeals for the Ninth Circuit affirmed that decision. The arguments brought to the Ninth Circuit lacked foundation, and the plaintiffs failed to raise legally sound arguments. With stronger arguments focused on the underinclusive and overinclusive nature of the statute, the plaintiffs might have successfully challenged the law as being unconstitutionally vague or overbroad, depending on the state's legitimate interests in enacting the law.

The plaintiffs failed to win preliminary injunctive relief because they failed to argue meritorious claims. However, if the courts do not invalidate the statute, foie gras will be permanently banned in the state.

#### I. BACKGROUND OF THE CASE

The plaintiffs in *Ass'n des Eleveurs de Canards et d'Oies du Quebec* sued to prevent enforcement of the recently enacted sections 25980-25984 of the California Health and Safety Code. The plaintiffs included the Association des Éleveurs de Canards et d'Oies du Québec and HVFG LLC, which were non-California entities that raised ducks for slaughter and were producers and sellers of foie gras, and Hot's Restaurant Group, Inc., a restaurant in California that sold foie gras before section 25982 came into effect.<sup>12</sup> The plaintiffs had invested in the production and sale of foie gras.<sup>13</sup> In July 2012, however, the plaintiffs were banned from force-feeding birds when section 25982 came into effect; this forced the plaintiffs to cease their commercial

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<sup>10</sup> *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013), *cert. denied*, 82 U.S.L.W. 3661 (U.S. Oct. 14, 2014) (No- 13-1313).

<sup>11</sup> *See id.*

<sup>12</sup> *Id.* at 942.

<sup>13</sup> *Id.* at 941-42.

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activity and personal consumption of foie gras.<sup>14</sup> This statute was passed in 2005, but the legislature allowed seven years before it would take effect in order to allow producers of foie gras the opportunity to adjust.<sup>15</sup> Even though the seven years had passed, the plaintiffs had not adjusted their business practices and argued that they should not have had to adjust because this is a practice that has been around for thousands of years.<sup>16</sup>

The production of foie gras involves four stages. First, one-day-old ducklings are taken from hatcheries to breeding farms. The ducks are raised for eleven to thirteen weeks, or until they are fully grown. During the first month, the ducks consume pellets from feeding pans accessible twenty-four hours a day. During the second stage, for the following month or two, different pellets are provided to the ducks twenty-four hours a day. Thirdly, for two weeks, the feeding pans are only available to the ducks only at certain times throughout the day. The final stage of foie gras production is known as gavage, a ten-to-thirteen day process in which “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.”<sup>17</sup> It is this final stage of the process that helps fatten the duck livers, and that is the portion of the plaintiffs’ practices that are banned by the statute.

The relevant portions of sections 25981 and 25982 provide that a person may not force-feed a bird for the purpose of enlarging the bird’s liver beyond normal size, and 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.<sup>18</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> Tim Hull, *Fans of Foie Gras Can’t Topple California Ban*, COURTHOUSE NEWS SERVICE, (Aug. 30, 2013), available at [www.courthousenews.com/2013/08/30/60767.htm](http://www.courthousenews.com/2013/08/30/60767.htm).

<sup>16</sup> *Id.*

<sup>17</sup> *Ass’n des Eleveurs de Canards et d’Oies du Quebec*, 729 F.3d at 942 (internal quotation marks omitted).

<sup>18</sup> Sections 25980—25984 of the California Health and Safety Code read as follows:

§ 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

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A panel of the Ninth Circuit rejected the plaintiffs' arguments and affirmed the district court's denial of the preliminary injunction. Soon after the Ninth Circuit filed its decision, the plaintiffs filed a petition for rehearing and rehearing en banc on September 23, 2013. On October 18, 2013, the court of appeals issued an order directing the defendants to file a response to the petition for rehearing and rehearing en banc within twenty-one days.<sup>19</sup> The plaintiffs were unsuccessful; not one judge voted to rehear the case en banc, and an order declaring so was issued in January 2014.

## II. DISCUSSION

If the plaintiffs had amended their arguments above, or supplemented them with more substantive arguments, they would have likely succeeded in their motion for a preliminary injunction, or at least their motion would not have been denied on the basis their claims were unlikely to succeed on the merits. For the following reasons, the plaintiffs could have succeeded in their initial motion for a preliminary injunction and would have had a more substantive argument to have the statute invalidated as a violation of the Due Process Clause. The

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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.

<sup>19</sup> See Docket Entry #55 (Oct. 18, 2013), *Ass'n des Eleveurs de Canards et d'Oies du Quebec*, 729 F.3d 937 (No. 12-56822).

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plaintiffs' arguments under the Commerce Clause also could have succeeded if the plaintiffs had shown supporting economic facts and pursued that claim in a different manner.

## A. THE STANDARD FOR A PRELIMINARY INJUNCTION

Although the plaintiffs have not yet lost the war, they did lose the opening battle for a preliminary injunction because they failed to make sufficient claims that had a likelihood of succeeding on the merits. After hearing the parties' arguments, the district court denied their motion for a preliminary injunction. Even though the plaintiffs appealed, the denial was affirmed by the Court of Appeals.

The district court properly applied the standard for a preliminary injunction, but the plaintiffs' claims failed to meet the standard. The standard for granting a preliminary injunction was established by the U.S. Supreme Court in the *Winter v. Natural Resources Defense Council, Inc.* The *Winter* preliminary-injunction test is that "[a] plaintiff . . . 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.'"<sup>20</sup> The Ninth Circuit uses a "sliding scale" approach, under which "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.'"<sup>21</sup> The Ninth Circuit reviewed the present case *de novo*, looking for either an erroneous legal premise or an abuse of discretion. The court agreed with the district court that the "plaintiff has failed to show the likelihood of success on the merits," and it held that it "need not consider the remaining three *Winter* elements."<sup>22</sup>

Had the plaintiffs provided more substantial arguments, the preliminary injunction may have been granted. However, if the plaintiffs modify their arguments to include more legally sound issues, the overall case could still be won.

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<sup>20</sup> *Ass'n des Eleveurs de Canards et d'Oies du Quebec*, 729 F.3d at 944 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

<sup>21</sup> *Id.* at 944 (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011)).

<sup>22</sup> *Id.* (brackets omitted).

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**B. WHAT THE PLAINTIFFS ACTUALLY ARGUED AND THE COURT'S DECISION**

The plaintiffs contended that the statute is unconstitutional because it violates the Due Process Clause and the Commerce Clause.<sup>23</sup> The district court and the Ninth Circuit agreed with the State's interpretations of the statute that section 25982 prohibits only products resulting from force-feeding birds to enlarge the liver. In other words, only "products made from an enlarged duck liver" are restricted. This was contrary to the plaintiffs' interpretation that this section extends to all products derived from a bird that has been force-fed for the purpose of enlarging its liver. The courts' interpretation limited the scope of the argument to focus on foie gras alone.<sup>24</sup> Turning to legislative history, the Ninth Circuit noted that the bill was "intended to prohibit the force feeding of ducks and geese," and the court emphasized that foie gras is the only product produced via force-feeding.<sup>25</sup>

The plaintiffs' main contentions that the ban violated their due-process rights were that "(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."<sup>26</sup> The Ninth Circuit rejected both arguments. First, the court held that the statute adequately provided notice of what force-feeding meant because the statute provides key terms that define the process, such as feeding a bird using a tube such that the bird would consume more than it would otherwise.<sup>27</sup> Next, the court held that the statute provides individuals with adequate notice because the "purpose" of force-feeding to produce an enlarged liver refers to "the objective

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<sup>23</sup> *Id.* at 943.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 945 & n.3 ("[F]oie gras is the only product produced via force feeding mentioned in the Bill Analyses. 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 foie gras; and support for, and against, the foie gras industry.") (citing Sen. Comm. on Bus. & Professions (Cal. 2004), Analysis of S.B. 1520 as introduced Apr. 26, 2004, at 4. 5-12; Sen. Rules Comm. (Cal. 2004), Analysis of S.B. 1520 as amended May 6, 2004, at 5-12; Assemb. Comm. on Bus. & 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, 3-4, 6-7).

<sup>26</sup> *Id.* at 946.

<sup>27</sup> *Id.* at 945-46.



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nature of the force feeding, rather than the subjective motive of the farmer.”<sup>28</sup>

The court rejected plaintiffs’ arguments that section 25982 violates the Commerce Clause because it (1) discriminates against interstate commerce; and (2) directly regulates interstate commerce.<sup>29</sup> The court held that it does not discriminate against interstate commerce because it is a complete ban on both intrastate and interstate products in the state, focusing on the process of how the products are produced rather than the products’ origins.<sup>30</sup> The court also held that the statute does not directly regulate interstate commerce because section 25981 targets in-state entities while section 25982 targets both in- and out-of-state entities, such that foie gras cannot be legally sold in California, no matter the source. It further held that the plaintiffs failed to prove that section 25982 “constitutes a total ban on foie gras or that a nationally uniform production method is required for foie gras.”<sup>31</sup> Furthermore, the court determined that the statute does not fix prices and that there is no evidence that it will practically lead to conflicting legislation.<sup>32</sup>

The only fact the parties appeared to agree on was that “the State has an interest in preventing animal cruelty in California,” but not whether this statute is effective in advancing that goal.<sup>33</sup> However, the court of appeals upheld the district court’s findings that there was no reason to doubt the State’s motive in enacting the statute to discourage “the consumption of products produced by force feedings birds and prevent[s] complicity in a practice deemed cruel to animals.”<sup>34</sup> Because the court of appeals affirmed the district court’s holding that the plaintiffs had not raised a serious question on which they were likely to succeed on the merits, it never fully analyzed the other elements of the *Winter* test: whether the plaintiffs “will suffer irreparable harm; whether the balance of equities tip in Plaintiffs’ favor; or whether an injunction is in the public interest.”<sup>35</sup>

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<sup>28</sup> *Id.* at 947 (citing *W. Watersheds Project v. Interior Bd. of Land Appeals*, 624 F.3d 983, 987 (9th Cir.2010), which held 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).

<sup>29</sup> *Id.* at 945-46.

<sup>30</sup> *Id.* at 948 (citing *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994), which held 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.”).

<sup>31</sup> *Id.* at 948-49.

<sup>32</sup> *Id.* at 950-51.

<sup>33</sup> *Id.* at 952.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 952.

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The plaintiffs' arguments for vagueness and unfair notice should never have been presented, or at least the plaintiffs should not have relied solely on such arguments.

C. THE PLAINTIFFS FAILED TO ARGUE THE STATUTE IS UNDERINCLUSIVE OR INEFFECTIVE

The plaintiffs should have argued that the statute is underinclusive and ineffective because the statute prohibits only the sale of the liver of force-fed birds but no other products. In other words, the plaintiffs failed to raise the issue that the statute is irrationally underinclusive because it substantially fails to fulfill the statute's purpose, rendering the law ineffective. The plaintiffs failed to so much as hint to the court that this is the case. The State claimed it has an interest in preventing animal cruelty, but the only action it has taken in this regard is to prevent only *one* single product, foie gras, from being produced and sold in California.

The plaintiffs brought two unsuccessful due process claims: "(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."<sup>36</sup> The Ninth Circuit disagreed with the plaintiffs (and rightly so). However, if the plaintiffs provided the essential issue in the preceding paragraph, they might have won, at least in the short run.

The Ninth Circuit agreed with the State's interpretation that section 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."<sup>37</sup> But this does not include products resulting from these same force-fed birds that do not result from enlarged livers (i.e., breast meat from the same force-fed bird is not restricted).<sup>38</sup> This is where the statute is irrationally underinclusive. A statute that is both underinclusive and irrational violates the U.S. Constitution.<sup>39</sup> Not only does the statute here restrict solely products resulting from the force-feeding with the purpose of enlarging a bird's liver (or foie gras), it absolutely does not extend to the byproducts of the same force-fed birds. This is significant because duck farming is limited in the United States,

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<sup>36</sup> *Id.* at 946.

<sup>37</sup> *Id.* at 944.

<sup>38</sup> "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. In the district court, Plaintiffs' evidence showed that foie gras was the only product that was produced by force feeding. Thus, the only product covered by § 25982 at issue in this appeal is foie gras." *Ass'n des Eleveurs de Canards et d'Oies du Quebec*, 729 F.3d at 945-46 (footnotes omitted).

<sup>39</sup> U.S. CONS. amend. XIV, § 1; *see also* *Bussey v. Harris*, 611 F.2d 1001 (5th Cir. 1980).

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and just as a one writer said of the situation in Vermont, “there are a number of pork producers in the area as well as lamb, chicken and beef. Great Tasting Ducks however are all coming from upstate New York and are usually the [byproduct] of Foie gras which is totally a unsustainable [model] of raising ducks.”<sup>40</sup> Moreover, duck farmers would not rely solely on the production of foie gras anyway because “[a]t a wholesale price of around \$30 a pound for [Grade] A’s, the liver is the most prized part of the duck, but it’s hardly enough to sustain the business” of LaBelle Farms, the second largest of only three foie gras farms in the United States.<sup>41</sup> Another writer explained how one foie gras producer uses the rest of the duck parts to successfully maintain its business:

“We use and sell every part of the duck except the heads and feet,” explains Bob [business partner and head of Bella Bella Gourmet]. The breasts, known as *magret* are removed and individually packaged to be sold fresh to chefs and gourmet butchers. Some of them are cured and dried into duck prosciutto, or smoked to a sweet, ham-like flavor. The excess fat (of which there is plenty) gets rendered down and sold to restaurants. The legs are cooked in the traditional french *confit* style, while the wings are smoked and slow-cooked.”<sup>42</sup>

Even though the wholesale price was \$30 a pound in 2010 when the foregoing passage was written, the current price of Grade A foie gras is \$80 a pound on the Bella Bella Gourmet website.<sup>43</sup> This may be due to the fact that there are (or were) only three producers of foie gras in the country, one of which is based in California,<sup>44</sup> reducing the number of foie gras producers to two found in New York.<sup>45</sup>

<sup>40</sup> *Not Your Ordinary Farm, Farmer or Chef. Now Lets [sic] Make Prosciutto*, A CHEF’S BLOG (Feb. 12, 2012), <http://ismailthechef.wordpress.com/category/foie-gras/>.

<sup>41</sup> “With a production of around 2,500 birds a week, La Belle Farms is the second largest of the three foie gras farms in the country (the others are Hudson Valley Foie Gras located a few miles away in Sullivan County, and Sonoma Artisan Foie in California). Despite its relatively large size, La Belle Farms is still a vertically integrated farm.” J. Kenji López-Alt, *The Physiology of Foie: Why Foie Gras is Not Unethical*, SERIOUS EATS (Dec. 16, 2010, 7:00 AM), [www.serious-eats.com/2010/12/the-physiology-of-foie-why-foie-gras-is-not-u.html](http://www.serious-eats.com/2010/12/the-physiology-of-foie-why-foie-gras-is-not-u.html).

<sup>42</sup> *Id.*

<sup>43</sup> *Foie Gras*, BELLA BELLA GOURMET FOODS, [www.bellabellagourmet.com/foie-gras-1/](http://www.bellabellagourmet.com/foie-gras-1/) (last visited Dec. 27, 2013) (also selling other duck products, or byproducts, of foie gras production).

<sup>44</sup> “California’s only foie gras producer, Sonoma Artisan Foie Gras, closed shop at the start of the ban.” Norimutsu Onishi, *Some in California Skirt a Ban on Foie Gras*, N.Y. TIMES, Aug. 12, 2012, [www.nytimes.com/2012/08/13/us/some-california-restaurants-skirt-foie-gras-ban.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/08/13/us/some-california-restaurants-skirt-foie-gras-ban.html?pagewanted=all&_r=0).

<sup>45</sup> *The Pain Behind Foie Gras*, PETA, [www.peta.org/issues/animals-used-for-food/animals-used-food-factsheets/pain-behind-foie-gras/](http://www.peta.org/issues/animals-used-for-food/animals-used-food-factsheets/pain-behind-foie-gras/) (last visited Dec. 27, 2013).

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As noted above, the Ninth Circuit interpreted California's statutes to only ban ducks from being force-fed only if the purpose is to enlarge the bird's liver. However, when a bird is force-fed, the bird gains a lot of weight. "A *New York Times* reporter who visited Sonoma Foie Gras in California found that young ducks had their beaks clipped and that birds were so fat that they moved little and panted."<sup>46</sup> To the sensitive individual, seeing an animal unable to walk is heartbreaking, but in terms of business, this extra weight means more meat to sell. Extra weight means that there are more products per bird, which in turn translates to mean that the producers earn more profit per bird. Thus, even if the foie gras is no longer a saleable item in California, it may not stop a duck farmer seeking a loophole by force-feeding ducks with the purpose of fattening the birds despite the affects to their livers, which may simply be noted as "not the purpose of force-feeding" the birds and tossed away to avoid violating the statutes.

There is no rational basis for the legislature to limit the prohibition of products of "animal cruelty" to just one organ of a force-fed bird while allowing the rest of the same animal to be produced and sold in the same manner, and that is why the California Health and Safety Code sections 25980-25984 are unconstitutionally under inclusive.

D. THE PLAINTIFFS FAILED TO ARGUE IN THE ALTERNATIVE THAT THE STATUTE IS OVERBROAD FOR INEFFECTIVENESS AND/OR IS INEFFECTIVE

In addition to the above, the plaintiffs should have argued that the statute is overbroad for its ineffectiveness or simply that the statute is invalid because it is ineffective. Generally, a statute is found unconstitutionally broad if it is "not sufficiently restricted to a specific subject or purpose."<sup>47</sup> The California courts have found that "[a] statute or regulation is [unconstitutionally] overbroad if it does not aim specifically at evils within the allowable area of governmental control, but sweeps within its ambit other activities that in the ordinary circumstances constitute an exercise of protected expression and conduct."<sup>48</sup> And, "[t]here is a presumption against a construction which

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<sup>46</sup> *Id.* (internal quotation marks and brackets omitted).

<sup>47</sup> *Overbroad* *Definition*, FINDLAW, <http://dictionary.findlaw.com/definition/overbroad.html#sthash.1YGAHHPF.dpuf> (last visited Aug. 27, 2014).

<sup>48</sup> *People v. Leon*, 181 Cal. Rptr. 3d 410, 419 (Ct. App. 2010) (internal quotation marks, brackets, and ellipsis omitted).

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would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience.”<sup>49</sup>

As discussed above, the Ninth Circuit held that foie gras is the only product banned from commerce; however, the rest of the bird, even if exposed to the same process of gavage, can be produced and sold without violating this same statute. If the purpose of the State is to prevent animal cruelty, this statute does not achieve this goal because producers of foie gras may continue their practice as normal—they just cannot sell the foie gras itself—and the birds will continue to be exposed to the same practices the State finds cruel to animals. Thus, the statute is not sufficiently restricted in reaching a specific purpose, and should be held unconstitutionally broad and ineffective.

Furthermore, the plaintiffs failed to argue that the statute is ineffective because although force-fed foie gras cannot enter interstate or intrastate commerce, there is no prohibition against “gifting” force-fed foie gras. There are some chefs who are rebelling against this new law, and there is nothing in the statute that can prevent their actions. Rather than selling the delicacy on their menus, they are simply giving the foie gras away to their customers.<sup>50</sup> This is a dangerous road for the legislature because it has essentially created a legal black market for force-fed foie gras. However, the plaintiffs did not mention this in their arguments to the Ninth Circuit.

Whether or not the court would agree with these arguments, they are still legally strong arguments that the plaintiffs should have brought to the court.

#### E. FINALLY, THE COMMERCE-CLAUSE ARGUMENT

The plaintiffs argued that the statute (1) discriminates against interstate commerce and (2) directly regulates interstate commerce.<sup>51</sup> However, these arguments presented to the Ninth Circuit were weak arguments that the court correctly rejected, and the plaintiffs should not raise them further. The plaintiffs failed to argue that the statute regulates interstate commerce by its effect on interstate commerce. The court analyzed this argument and determined that because the statute bans

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<sup>49</sup> United States v. Powers, 307 U.S. 214, 217 (1939) (internal quotation marks omitted).

<sup>50</sup> See, e.g., Erin Mosbaugh, *Sorry, California: The Foie Gras Ban Remains*, FIRST WE FEAST (Sept. 3, 2013, 10:37 AM), <http://firstwefeast.com/eat/foie-gras-ban-in-california-upheld-by-federal-judges/>.

<sup>51</sup> Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 947 (9th Cir. 2013).

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force-fed foie gras from both interstate and intrastate commerce similarly, it does not discriminate against interstate commerce.

The only plausible argument the plaintiffs could bring regarding the Commerce Clause is that the statute overburdens interstate commerce because the California producer is the only foie gras producer on the west coast and is one of only three producers in the United States. Thus, the statute regulates interstate commerce in its effect. To qualify for this argument the statute must “impose[] a burden on interstate commerce that is ‘clearly excessive in relation to the putative local benefits.’”<sup>52</sup>

If the plaintiffs can prove that preventing the California producer from participating in interstate commerce for foie gras substantially affects interstate commerce, then the plaintiffs may be able to succeed in this claim. However, if the plaintiffs can prove this effect, they must also demonstrate that this effect overcomes the State’s purpose in preventing animal cruelty. In any case, considering that the statute is clearly ineffective in protecting birds from gavage, it is likely that the plaintiffs could succeed.

### III. A COMPROMISE ALWAYS EXISTS . . .

Even though they have failed at their first attempt in having this law judicially invalidated, the plaintiffs could supplement their case with the above argument and have a likely chance at succeeding on the merits. However, the legislature would do well to amend the law such that birds are protected from animal cruelty without limiting the scope to the single force-feeding product foie gras because it is irrationally under inclusive and allows a plethora of other bird products and byproducts of foie gras production to be produced and sold legally within California. Amending the law to ban all force-feeding of poultry and the several products therefrom would further the State’s interest and preserve the public policy of protecting simple creatures from unnatural cruelty such as the brutal force-feeding of gavage.

While keeping in mind an animal’s well-being, however, it must be considered that a certain level of harm must be allowed in order to preserve this nation’s well-incorporated habit of consuming animal products, most of which require the death of such animals. It is absurd to think that the entire nation will stop consuming animal products in order to prevent any harm from coming to any animal, but this State’s people should also not be cold-hearted when it comes to the cycle of life.

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<sup>52</sup> C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 390 (1994) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

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However, the producers of foie gras should focus on alternative methods of producing foie gras. One alternative is to simply not to force-feed birds because, even if it is less profitable, foie gras can be produced without causing the birds to endure the harsh (and currently illegal) method of gavage.<sup>53</sup> In fact, the highest quality of fattened liver produced is found in Extramadura, in the southwestern portion of Spain, and it is farmed by Eduardo Sousa.<sup>54</sup> One authority dubs Eduardo the “goose whisperer” because he communicates with his geese in strange ways but is seemingly very successful at raising his animals.<sup>55</sup>

Eduardo is raising what he calls natural foie gras. So what’s natural about natural foie gras? Well, he takes advantage of the goose’s natural reaction when the weather turns cold, at right about this time of year: the geese naturally gavage: they gorge on everything around them, storing up calories for the winter. . . . A very simple idea. Eduardo slaughters the geese at the end of this period of natural gavage, and he gets a liver that he claims is better than foie gras. That’s what he’s been claiming on his label, Pateria de Sousa, which has been around since 1812. His great-grandfather started Pateria de Sousa, and the family has been marketing it quietly ever since, until last year when Eduardo won the Coup de Coeur, the most coveted gastronomic award in France. Based in Paris, it is awarded to the best food products. Eduardo’s natural foie gras won out over 10,000 foie gras entries.<sup>56</sup>

In light of his already-unusual farming techniques, Eduard even found a natural food source to turn the foie gras bright yellow, which is the buyer’s cue for quality foie gras that is normally left over by the gavage process. Eduardo accomplished this by feeding the geese something they love: wild yellow lupine. This goose whisperer allows his geese to roam in an open-top, fenced area (electrified only on the outside to keep predators away from his geese). His geese are so happy that they even convince wild geese migrating south to join the flock

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<sup>53</sup> “In most foie gras production, the animal is force-fed [*sic*] corn through a process known as ‘gavage,’ although foie gras can also be produced without the gavage process. The most interesting aspect of this debate is that some have argued that the best foie gras in the world is produced on a farm in Spain where the animals are not force [fed] but naturally fatten themselves up.” Admin, *Foie Gras: To Eat Or Not To Eat?*, MARCUS SAMUELSSON (Aug. 31, 2011), [www.marcussamuelsson.com/news/foie-gras-to-eat-or-not-to-eat](http://www.marcussamuelsson.com/news/foie-gras-to-eat-or-not-to-eat).

<sup>54</sup> Dan Barber, Address at Twenty-Eight Annual E.F. Schumacher Lectures; Natural Foie Gras and the Future of Food (Oct. 8, 2008), available at NEW ECONOMY COALITION, <http://neweconomy.net/publications/articles/barber/dan/a-perfect-expression-of-nature>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

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permanently and breed.<sup>57</sup> However, when asked why chefs do not serve his foie gras in their restaurants, the goose whisperer replied, “It’s because chefs don’t deserve my foie gras.”<sup>58</sup> The farmer believes in raising his geese naturally, and in serving the products of his geese naturally as well, and putting the foie gras in the hands of amateurs goes against his beliefs. However, even if Eduardo does not sell his prized foie gras around the world, others should follow his lead for both a higher quality product and for the sake of keeping the animals in a healthy, comfortable environment.

The goose whisperer’s process is a reasonable compromise and could ensure that foie gras lovers may continue to enjoy their delicacies without fostering anger amongst animal rights-activists, and foie gras producers in the United States should follow his farming techniques. If he is able to accomplish all this in the harshest of environments in Spain, then surely the widespread geographical ranges of this country can accommodate natural foie gras just as well, or perhaps with even more success.

## CONCLUSION

Allowing animals to enjoy their lives absent cruel human practices is a goal worth pursuing. However, chefs and food connoisseurs would also say the same about delicious food (such as the foie gras delicacy). Finding the balance between the promotion of animal consumption and prevention of animal cruelty is a constant struggle, but the legislature, businesses, consumers, and animal-rights activists should not give in because each side is worthy of acceptance and accommodation. Producers of foie gras should seek out more natural methods of producing the same addicting delicacy of fattened liver without simultaneously forcing the ducks and geese to endure harsh treatments and a life of suffering. Allowing foie gras’s production and consumption by means of gavage to continue in California should not be the long-term solution. In the short run however, preventing this one type of product within California is simply not enough to further the State’s interest in preventing animal cruelty to birds and more should be done to prevent all types of force-feeding to birds because of the mortal harm and psychological stress it puts on the animals.

The plaintiffs in *Ass’n des Eleveurs de Canards et d’Oies du Quebec* could have advanced stronger arguments in claiming the law

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*



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violated their Due Process rights or violated the Commerce Clause. On the other hand, animal-rights activists should push the legislature to take the initiative to amend the law so that all types of force-feed bird products are banned and the abuse of animals is effectively prohibited within California. In the end, it would be wise for all interested parties to settle on a compromise by opening their doors and investing in the goose whisperer's methods of producing both natural foie gras and happy geese.