No. 17-1285

In the Supreme Court of the United States

ASSOCIATION DES ELEVEURS DE CANARDS ET D'OIES DU QUEBEC, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE U.S. POULTRY & EGG ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

The U.S. Poultry & Egg Association (the "Association") is the Nation's largest and most active poultry organization. Its membership includes producers and processors of broilers, turkeys, ducks, eggs, and breeding stock, as well as allied companies. Formed in 1947, the Association maintains affiliates in 27 states and has member companies worldwide. The Association sponsors and conducts an array of programs that focus on industry promotion, education, communications, and research, to include generating and analyzing industry data and formulating position papers on regulatory and economic issues of importance to the industry.

SUMMARY OF THE ARGUMENT

The poultry and egg industry comprises a large portion of our national food supply. Its members generate hundreds of billions of dollars in goods and services each year, directly or indirectly employ well over one million Americans, and remit tens of billions of dollars in tax revenues. Integral to the Association's—and, by extension, the Nation's—economic health is the uniform regulatory regime designed by Congress in the Poultry Products

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amicus*, its counsel, or its members made such a monetary contribution. Counsel for all parties received notice at least 10 days before the due date of *amicus*'s intention to file this brief and consented to the filing of the brief.

Inspection Act, 21 U.S.C. § 451, *et seq.* ("PPIA"), and implemented by the U.S. Department of Agriculture ("USDA"). The judgment of the Ninth Circuit, which licenses state and local governments to displace the federal scheme with a variegated patchwork of disparate standards governing the sale of poultry products, not only defies Congress' and this Court's express directives, but threatens to exact substantial burdens on a significant sector of the national economy and food supply.

For some five decades, the regulatory environment in which the poultry and egg industry operates has been undergirded by a settled understanding that the PPIA "manifests a congressional intent to prescribe uniform standards of identity and composition." *Armour & Co. v. Ball*, 468 F.2d 76, 83 (6th Cir. 1972) (interpreting preemption clause in Federal Meat Inspection Act ("FMIA") identical to that in the PPIA). Congress' explicit instruction that no state or locality may impose "[m]arking, labeling, packaging, or ingredient requirements . . . in addition to or different than" those prescribed by the USDA, *see* 21 U.S.C. § 467e, precludes laws such as California Health & Safety Code § 25982, which prohibits the sale of poultry liver products, such as those containing foie gras, "if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."

Enactments such as § 25982 disrupt Congress' uniform regulatory framework and effectively interdict the federally supervised flow of poultry products across state lines. In this vein, even if the PPIA's preemption clause did not expressly invalidate § 25982 (and it does), the California statute impinges on a field that

Congress occupies in its entirety, and substantially obstructs the attainment of valid federal regulatory objectives.

More generally, this Court's intervention is necessary to forestall pervasive disruptions and serious dislocations in the poultry and egg industry, which would prove injurious not only to employers and workers in that sector, but also to consumers nationwide. While on its face limited to foie gras, § 25982 represents a nascent effort to upend the detailed regulatory code carefully wrought by Congress and the USDA over decades.

The Ninth Circuit's conclusion that states and localities have *carte blanche* authority to "regulate the *types* of poultry that may be sold for human consumption," *Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140, 1150 (9th Cir. 2017), furnishes an easy roadmap for vitiating the PPIA. If, as the Ninth Circuit maintains, states can evade Congress' undisputed exclusive authority to impose "ingredient requirements" simply by styling their own mandates as "prohibitions" on "types of poultry," the federal regulatory framework will be effectively supplanted by a disjointed hodgepodge of state laws. This in turn will occlude critical channels of interstate commerce, engender legal uncertainty, and increase costs to consumers—precisely the outcomes Congress sought to avoid, *see* 21 U.S.C. § 451. As it did in *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012), this Court should enforce the clear intent of Congress, as distilled in the expansive and unambiguous preemptive language of 21 U.S.C. § 467e.

ARGUMENT

I. THE PPIA EXPRESSLY OR IMPLIEDLY PREEMPTS ANY STATE OR LOCAL LAW THAT REGULATES THE TYPES OF POULTRY THAT MAY BE SOLD FOR HUMAN CONSUMPTION.

Our constitutional edifice is constructed on the premise that the "Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It follows from this precept that "if the law of congress . . . be a constitutional act, it must have its full and complete effects. Its operation cannot be either defeated or impeded by acts of state legislation." *M'Culloch v. Maryland*, 17 U.S. 316, 330 (1819). In exercising its constitutional prerogative to regulate "Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, Congress enacted the PPIA to establish a comprehensive and unitary legal infrastructure designed to provide predictability and certainty to the poultry industry and consumers. To this end, the PPIA established a single locus of regulatory authority (namely, the USDA) in connection with all ["m]arking, labeling, packaging, or ingredient requirements" governing poultry products, and foreclosed any "addition[al]" or "different" state mandates. 21 U.S.C. § 467e. By prohibiting the in-state sale of poultry products that undisputedly conform to all USDA ingredient mandates, § 25982 falls squarely within this preemptive ambit.

A. Restrictions on the Sale of Types of Poultry Products Impose "Ingredient Requirements" That Are "in Addition to or Different Than" Those Established by Federal Law

The Association will not here reiterate the argument ably developed in the Petition for Writ of Certiorari that 21 U.S.C. § 467e expressly preempts California Health & Safety Code § 25982. It wishes to underscore, however, how a constellation of precedents of this Court and the Circuit Courts of Appeal have engendered a settled expectation in the poultry and egg industry that the USDA is exclusively empowered to determine whether and under what circumstances a poultry product may be sold for human consumption.

In a case that adumbrated this dispute, Michigan in 1952 enacted a statute that prohibited the in-state sale of any sausage that did constitute "grade 1 sausage," as defined by state law. Rejecting Michigan's contention that its ban did not disturb the federal regulatory regime established by the FMIA, the Sixth Circuit reasoned that the state statute imposed an "ingredient requirement" in contravention of Congress' express preemption of "marking, labeling, . . . or ingredient requirements in addition to, or different than, those made under" the federal Act. *Armour*, 468 F.2d at 84 (quoting 21 U.S.C. § 678). While acknowledging Michigan's desire to protect its residents, the court concluded that its preferred legislative ministrations must yield to the "clear and complete preemption ordained by Congress." *Armour*, 468 F.2d at 85.

The import of *Armour* for the poultry industry was significant. Although that case was founded in the

FMIA, the statute's preemption clause is substantively identical to that in the PPIA; indeed, the Sixth Circuit noted that the two enactments share the same "precise preemptive language." *Id.* Compounded with Congress' stated desire that the PPIA would establish a regulatory structure for poultry products coextensive with that governing meat products, *see generally* Cong. Rec. – Senate 1644, Feb. 7, 1957 (Statement of Sen. Humphrey) (indicating that PPIA contemplated a "poultry program that would give Americans the same protection as meat inspection has provided during the last half century"), *Armour* established a regulatory equilibrium that fixed authority to prescribe the permissible content of poultry products solely in the USDA.

Subsequent pronouncements of this Court and the Circuit Courts of Appeal reinforced PPIA's robust preemptive scope. *See, e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 530–31 (1977) (finding that FMIA's "explicit pre-emption provision dictates" invalidation of state laws concerning determination of product's net weight for labeling purposes); *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, 1003 (2d Cir. 1985), *aff'd sub nom. Gerace v. Grocery Manufacturers of Am., Inc.*, 474 U.S. 801 (1985) (holding that New York's labeling requirements governing meat and poultry products containing imitation cheeses "do not comport exactly with the federal specifications" and were thus preempted by the FMIA and the "essentially identical" preemption clause in the PPIA); *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 747 (9th Cir. 1994) (concluding that PPIA preempted California law that prohibited certain poultry products from being labeled "fresh,"

even though they satisfied federal criteria for "fresh" labeling).

This Court's judgment in *National Meat* implicitly ratified these precedents and expressly affirmed that the scope of federal preemption in the meat (and, by extension, poultry) context "sweeps widely." 565 U.S. at 459. Evaluating a California statute that imposed mandates for handling non-ambulatory pigs that extended beyond the federally prescribed requirements, this Court resoundingly rejected California's argument that "'states are free to decide which animals may be turned into meat.'" *Id.* at 465. Undeterred, California now proffers precisely the same discredited rationale in defense of § 25982.

National Meat is important not only because it compels the reversal of the Ninth Circuit's judgment in this case. More fundamentally, *National Meat* encapsulates and entrenches a key legal and economic premise of the poultry and egg industry—namely, that if a poultry product complies with the USDA's panoply of rigorous quality and safety directives, no state or locality can prohibit or otherwise impede its sale. Because § 25982 is irreconcilable with this precept and with the express preemptive language of 21 U.S.C. § 467e, this Court's intervention is necessary.

B. The PPIA Occupies the Field of Regulating What Types of Poultry Products May Be Sold

Even if § 25982 were to somehow elude the literal terms of the PPIA's express preemption clause, Congress' and the USDA's extensive and exhaustive oversight of the production of poultry products occupies

this regulatory field to the exclusion of any state or local laws governing the subject. This Court has long recognized that a "scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" and thus impliedly preempts state or local enactments. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Arizona v. United States*, 567 U.S. 387, 401 (2012) ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.").

In discerning an intent to preempt a field, the Court examines Congress' likely objectives, as manifested by the existence of a "dominant" federal interest and a "pervasive" swath of federal regulatory edicts. *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973). As the Sixth Circuit has recognized, the expansive regulatory scheme designed by Congress and implemented by the USDA comprehensively governs whether and under what conditions poultry products may be sold for human consumption. *See Armour*, 468 F.2d at 84 ("Congress has unmistakably ordained that 'marking, labeling . . . or ingredient requirements' prescribed by the Secretary completely preempt this field of commerce.").

The PPIA purports to broadly "regulate the processing and distribution of" poultry and poultry products, 21 U.S.C. § 452, terms that are defined capaciously to encompass "any domesticated bird, whether live or dead," and "any poultry carcass, or part thereof; or any product which is made wholly or in part from any poultry carcass of part thereof . . . ." *Id.* § 453(e), (f). The statute secures exclusive federal

control over "the distribution and sale of poultry products," *Voss*, 44 F.3d at 743, that are "found to be not adulterated," within the meaning of federal law. 21 U.S.C. § 457(a). The substantial breadth of the statutory directives is supplemented by a grant of authority to the Secretary of Agriculture to "promulgate such other rules and regulations as are necessary to carry out the provisions of" the PPIA. *Id.* § 463(b).

Pursuant to this mandate, the USDA has developed a rigorous and detailed regulatory framework that controls whether and how various poultry products may be prepared, processed and sold. These directives dictate in exhaustive detail virtually every aspect of the production of poultry products, ranging from specified relative percentages of light meat and dark meat in certain poultry items, *see* 9 C.F.R. § 381.156, to particularized definitions of various poultry products, to include "barbecued" poultry and poultry "steak or fillet," *see id.* §§ 381.162, 381.164. Other regulations specify particular parameters for preparing canned poultry and poultry rolls, *see id.* §§ 381.157, 381.159. Still others prescribe in detail the process for mechanically separating poultry items, *see id.* §§ 381.173, 381.174, or impose ceilings on skin content in poultry products, *see id.* § 381.168. Yet another rule itemizes an array of various ingredients that may be used in poultry products and the permissible quantities and purposes of each, *see id.* § 424.21.

Further underscoring the USDA's authority "to prescribe definitions and standards of identity or composition for poultry products whenever he determines such action is otherwise necessary for the

protection of the public," *id.* § 381.155, the agency has developed a nearly 200-page compendium that sets specific federal standards for meat and poultry products, including foie gras. *See* UNITED STATES DEPARTMENT OF AGRICULTURE, FOOD STANDARDS AND LABELING POLICY BOOK (2005) (hereafter, "USDA Policy Book"). By prohibiting the sale of a poultry "ingredient" (*i.e.*, fattened duck liver or foie gras) that conforms precisely to the USDA's guidance, California has inserted itself directly into the federal regulatory landscape.

It is no answer to counter, as the Ninth Circuit does, that the PPIA envisions a parallel role for states in certain delimited aspects of poultry storage, handling and inspection. *See Canards*, 870 F.3d at 1152. Whatever modest regulatory flexibility the PPIA may have afforded in the circumscribed areas of storage, handling, and inspection does not warrant a judicially made extension of this dispensation to the area of poultry *ingredients*—and in fact militates against it. *See generally Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (invoking negative implication canon and reasoning that statute's enumeration of an "express exception . . . implies that there are no *other* circumstances" in which an exception applies).

More to the point, the ability of states to regulate certain facets of a broad subject matter is not mutually exclusive of field preemption of a defined subset of the subject matter. *See Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 296 (5th Cir. 1994) (acknowledging provisions for federal and state coordination concerning inspection programs, but observing that "[t]he PPIA created one uniform regulatory scheme for the national market");

see also Arizona, 567 U.S. at 411-15 (holding that Congress' preemption of field of alien registration did not necessarily displace state law that required state officers to a make a "'reasonable attempt . . . to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States'"); *Rice*, 331 U.S. at 236-37 (finding that while federal Warehouse Act preempted certain fields, *e.g.*, rate-setting and maintenance of grain elevators, it did not necessarily preclude state laws relating to, *e.g.*, certain contracts and leases by warehouse operators). In short, the USDA's comprehensive corpus of mandates manifests Congress' intent to occupy the field of regulating poultry ingredients—to include the processes and manner through which such ingredients are prepared or derived.

C. California's Statute Obstructs the Accomplishment of Congress' Objectives

Even if the PPIA's broad scope falls short of field preemption, "a state law is preempted where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 567 U.S. at 406 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Notably, "the existence of an 'express preemption provisio[n] does *not* bar the ordinary working of conflict preemption principles' or impose a 'special burden' that would make it more difficult to establish the preemption of laws falling outside the clause." *Arizona*, 567 U.S. at 406 (quoting *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 869–72 (2000)).

The text of the PPIA itself conveys Congress' conclusion that federal regulation of poultry products is needed to "prevent and eliminate burdens upon [interstate] commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers." 21 U.S.C. § 451. Although the provision contemplates "cooperation by the States and other jurisdictions," *id.*, state efforts to faithfully effectuate federal pronouncements are wholly distinct from attempts—such as California's § 25982—to impose independent substantive requirements on the regulated community. *See Arizona*, 567 U.S. at 410 (federal law preempted state law expanding state officers' authority to arrest aliens, notwithstanding federal statutory provision permitting state officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." (quoting 8 U.S.C. § 1357(g)(10)(B)). In the same vein, the PPIA further commits to achieving "uniform inspection standards and uniform applications thereof." 21 U.S.C. § 452.

The notion that the States have free rein to "regulate the *types* of poultry that may be sold for human consumption," *Canards*, 870 F.3d at 1150, is irreconcilable with Congress' stated aspiration of securing a "uniform" regulatory scheme to facilitate a cohesive national market for poultry products. The Ninth Circuit's insistence that Congress was not concerned with conduct "that occurs far away from the official establishments that the PPIA regulates," 870 F.3d at 1153, is belied by the PPIA's broad preemption of all "ingredient requirements," regardless of where such "ingredients" are produced, 21 U.S.C. § 467e.

Further, the ingredients regulated by § 25982 (*i.e.*, fattened duck livers) are indeed processed and added in "official establishments" under USDA supervision. *See National Meat*, 565 U.S. at 460 (finding preemption of California law that regulated handling of meat ingredients in federally regulated slaughterhouses). More fundamentally, the PPIA's preemptive effect does not hinge on artificial linguistic distinctions; regardless of whether § 25982 is characterized as an "animal welfare" regulation, a "prohibition" on a "type of poultry," or an "ingredient requirement," its effect is inescapably the same: it directly impedes Congress' desire to facilitate a unitary regulatory framework governing the content and composition of poultry and poultry products.[2]

In sum, the poultry and egg industry has over decades developed industry-wide practices and expectations on the foundational premise that if a poultry product conforms to the USDA's edicts, it may be properly distributed and sold nationwide. *See Schollenberger v. Comm. of Pa.*, 171 U.S. 1, 14 (1898) ("[W]e yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated. . . ."). Congress' and the USDA's design of a stringent and comprehensive regulatory infrastructure representing

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[2] Even if it were technically possible for a poultry producer to comply with both federal regulations and § 25982, the latter would remain preempted. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) ("[T]he fact that some companies may be able to comply with both sets of [laws] does not mean that the state Act is not at odds with the achievement of the federal decision . . . .").

a carefully calibrated balance between economic efficiency and consumer expectations confirms that state enactments concerning the content or composition of poultry products inevitably frustrate Congress' objectives. *See City of Burbank*, 411 U.S. at 639 (concluding that the "interdependence of [safety and efficiency] factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled"). The PPIA thus impliedly—as well as expressly—preempts § 25982.

II. A UNIFORM FEDERAL REGULATORY SCHEME IS ESSENTIAL TO THE POULTRY INDUSTRY'S CONTINUED ABILITY TO EFFICIENTLY SERVE THE NATION'S FOOD SUPPLY NEEDS.

The size and scale of the American poultry and egg industry are enormous. The aggregate production value of broilers, eggs, and turkey, and the values of sales from chickens, totaled $38.7 billion in 2016. *See* UNITED STATES DEPARTMENT OF AGRICULTURE, POULTRY – PRODUCTION AND VALUE, 2016 SUMMARY (2017), *available at* http://usda.mannlib.cornell.edu/usda/current/PoulProdVa/PoulProdVa-04-28-2017.pdf. In 2014, the Nation's 233,770 poultry farms supplied Americans with some 8.54 billion broilers, 99.8 billion eggs, and 238 million turkeys. *See* United States Department of Agriculture, USDA Poultry Production Data (May 2015), *available at* https://www.usda.gov/sites/default/files/documents/nass-poultry-stats-factsheet.pdf. While production tends to be concentrated in certain geographic regions, the industry as a whole is comprised of an elaborate, interstate reticulation of

commercial relationships among farmers, processors, distributors, and consumers. Although the USDA's regulatory scheme is rigorous and demanding, it is also uniform and universal. Industry actors can rely with relative certainty on a single, consolidated federal scheme when investing in equipment, entering into contracts, developing a supply chain, and formulating ingredients in their poultry products.

The Ninth Circuit's ruling in this case threatens to topple this bedrock of legal certainty. The court's facile insistence that § 25982 represents nothing more than a traditional police power regulation of "animal husbandry and feeding practices," 870 F.3d at 1148, obscures the true breadth of the statute and the Ninth Circuit's rationale to sustain it. By its plain terms, § 25982 bans the sale of a USDA-approved poultry product (*i.e.*, foie gras) that contains a USDA-approved ingredient (*i.e.*, the livers of force-fed birds), even when the disapproved "animal husbandry and feeding practices" occur thousands of miles away in other states.

The court's holding that states may prohibit "*types* of poultry that may be sold for human consumption"—but concededly may not require "ingredients" for such products—is constructed on a distinction that is specious in principle and untenable in practice. For example, suppose New York enacted a law that required all "country-style chicken"[3] sold within the state to include as a mandatory "ingredient"

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[3] "Country style chicken" is defined by the USDA as "cut up chicken in which the wishbone is left whole." *See* USDA Policy Book at 43.

the breast meat of chickens that were raised in coops that allowed each chicken ten square feet of living space at a constant temperature of 68 degrees. Such a statute prescribes an "ingredient" requirement that is "in addition to, or different than" those required by federal law, and thus is on its face within the preemptive scope of 21 U.S.C. § 467e. *See Canards*, 870 F.3d at 1147 (interpreting "ingredient" in the PPIA to mean a "physical component of a poultry product"). According to the Ninth Circuit, however, New York could salvage this restriction simply by restyling it as a "prohibition" on the sale of a "type of poultry" (*i.e.*, "country style chicken" that contains the meat of chickens raised in a manner of which New York disapproves).

The poultry industry—which generates billions of dollars in economic activity and serves millions of consumers—must not be held hostage to such contrived distinctions and semantic sleights of hand. *See Nat'l Broiler*, 44 F.3d at 743 (observing that "there is no practical difference" between affirmative requirements and purported "prohibitions"). Such legislative machinations will beget legal uncertainty, disrupt critical contractual and commercial relationships, strain the poultry and egg's industry's ability to efficiently meet consumer demand, and, ultimately, increase the prices Americans pay for poultry products.

This Court in *National Meat* acted decisively (at the preliminary injunction stage) to vindicate the FMIA's preemptive force against California's asserted prerogative "to decide which animals may be turned into meat." 565 U.S. at 465. California's current attempt "to decide which animals may be turned into" poultry products in defiance of the PPIA's identical

preemption clause necessitates this Court's intervention again. Congress has clearly stated in the PPIA its intent to preempt any state or local enactment—including § 25982—that prohibits or regulates the sale of any poultry product that complies with federal ingredient standards. The ability of the poultry and egg industry to continue effectively, efficiently, and safely serving American consumers depends upon the Court's willingness to enforce it.

CONCLUSION

For the foregoing reasons, the *amicus* respectfully requests that the Court grant the petition for a writ of certiorari.

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