No. 17-1285

In the Supreme Court of the United States

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC, *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 IN OPPOSITION

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QUESTION PRESENTED

Whether a state law prohibiting the sale in California of products resulting from force-feeding a bird imposes an "ingredient requirement" preempted by the federal Poultry Products Inspection Act.

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STATEMENT

1. The federal Poultry Products Inspection Act establishes a national inspection scheme regulating poultry slaughtering and processing in the United States. 21 U.S.C. §§ 451-472. The Act declares it "essential in the public interest that the health and welfare of consumers be protected by assuring that poultry products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." *Id.* § 451. It provides for federal inspection of slaughterhouses and poultry-processing plants (§ 455); requires that slaughterhouses and poultry-processing plants follow proper sanitation practices (§ 456(a)); prohibits the sale or transport of adulterated, misbranded, or uninspected poultry products (§ 458(a)(2)); and proscribes false or misleading labeling of poultry products (§ 457(c)). It gives the U.S. Department of Agriculture regulatory authority to implement its provisions. *Id.* § 463(b).

The PPIA does not address animal-husbandry practices. It is silent concerning standards for animal welfare on farms, including feeding methods. As the House report accompanying its enactment noted, the "bill does not regulate in any manner the handling, shipment, or sale of live poultry." H.R. Rep. No. 85-465, at 1 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1630, 1630.

In 1968, Congress amended the PPIA to ensure adequate inspection of poultry sold only in intra-state commerce. Among other things, the Wholesome Poultry Products Act created a cooperative system through which the federal government would assist States in developing and implementing rigorous inspection programs for poultry products sold within their borders.

21 U.S.C. § 454(a). It further provided for federal inspection of intra-state poultry slaughtering and processing if a State failed to enact such standards. *Id.* § 454(c)(1).

The preemption provision at issue in this case, 21 U.S.C. § 467e, was adopted as part of these amendments. The first sentence of Section 467e generally forbids States from imposing "[r]equirements within the scope of this chapter with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under this chapter." *Id.*; *see id.* § 453(p) (defining "official establishment" as where federal inspection of slaughtering or poultry processing occurs). The second sentence states that "[m]arking, labeling, packaging, or ingredient requirements … in addition to, or different than, those made under this chapter may not be imposed by any State … with respect to articles prepared at any official establishment in accordance with the requirements under this chapter," except that States "may, consistent with the requirements under this chapter exercise concurrent jurisdiction with the Secretary [of Agriculture] over articles required to be inspected under this chapter, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment …." *Id.* § 467e. Finally, Section 467e includes a savings clause that preserves state authority to "mak[e] requirement[s] or tak[e] other action, consistent with this chapter, with respect to any other matters regulated under this chapter." *Id.*

2. In 2004, the California Legislature adopted a statutory framework to address the practice of force-feeding birds on California farms and the in-state sale

of products made by force-feeding. Cal. Health & Safety Code §§ 25980-25984. California Health and Safety Code Section 25981 prohibits force-feeding a bird within the State "for the purpose of enlarging the bird's liver beyond normal size, or hir[ing] another person to do so." "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," including by "delivering feed through a tube or other device inserted into the bird's esophagus." *Id.* § 25980(b).

Section 25982, the only provision at issue in this case, correspondingly bars the sale in California of any product that "is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." This prohibition applies to products made from the liver of a bird that has been force-fed; it does not extend to non-liver products of force-fed birds, such as duck breasts or down jackets. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 945 (9th Cir. 2013).

In adopting these provisions, the California Legislature considered evidence that the process of force-feeding ducks and geese causes extreme suffering. The bill's author reported that the force-feeding process, which begins when ducks are twelve to fifteen weeks old, involves a worker holding the bird "between his or her knees," "grasp[ing] the head," and inserting a ten- to twelve-inch tube into the bird's esophagus to pump large amounts of concentrated meal and compressed air into the bird, "creating a golf ball-sized bulge as it goes down." Assemb. Comm. on Bus. & Prof., Bill Analysis, S.B. 1520, at 5-6 (Cal. June 22, 2004). The process is repeated up to three times a day

for several weeks. *Id.* at 5. According to the bill's author, this method of feeding results in the bird's liver swelling to about ten times its normal size. *Id.* at 4. The Legislature considered additional evidence that, at the time, only three entities in the United States produced foie gras, and more than a dozen countries had outlawed force-feeding birds for foie gras production. *Id.* at 5-6.

3. a. Petitioners initially challenged California's in-state sales ban under the Due Process Clause and the dormant Commerce Clause of the federal Constitution. Dist. Ct. Dkt. 1. The district court denied petitioners' motion for a preliminary injunction. Dkt. 87. The court of appeals affirmed, holding that petitioners were not likely to succeed on their claim that Section 25982 impermissibly regulated conduct occurring outside the State's borders. *Ass'n des Éleveurs*, 729 F.3d at 948-951. This Court denied review. 135 S. Ct. 398 (No. 13-1313).

Petitioners filed a second amended complaint including a claim that Section 25982 imposed an "ingredient requirement" that was both expressly preempted by 21 U.S.C. § 467e and impliedly preempted as an obstacle to achieving the PPIA's objectives. Dkt. 112. The district court agreed that the in-state sales ban was expressly preempted, holding that it was a forbidden "ingredient requirement" because it precluded the sale of products based on the presence of "a particular constituent—force-fed bird's liver." Pet. App. 44a. On that basis, it granted petitioners' motion for partial summary judgment and permanently enjoined respondent from enforcing Section 25982 against petitioners. *Id.* at 50a; *see also* Dkts. 156, 157 (entry of judgment on preemption claim and order closing case).

b. The court of appeals reversed. Pet. App. 1a-26a. It concluded that Section 25982 does not impose an "ingredient requirement" within the meaning of the PPIA. *Id.* at 15a-17a. Looking to the plain language of Section 467e, the statutory context, USDA regulations, and Congress's purpose, the court held that the Act uses the term "ingredient requirement" to refer to a regulation of the physical composition of poultry products. *Id.* at 11a-15a. The phrase does not extend to animal-husbandry techniques, which Congress declined to address in the PPIA. *Id.* at 14a.

Applying that construction of the Act, the court recognized that Section 25982 does not regulate the physical composition of any poultry product. Pet. App. 15a-16a. It does not require poultry products to be made with different physical components, or to contain any particular proportion of bird liver. *Id.* The state law "addresses a subject entirely separate from any 'ingredient requirement': how animals are treated long before they reach the slaughterhouse gates." *Id.* at 16a.

The court rejected petitioners' argument that Section 25982 functions as a prohibited "ingredient requirement" by requiring foie gras products sold in California to be made with the "ingredient" of a non-force-fed liver. Pet. App. 16a. It explained that the "difference between foie gras produced with force-fed birds and foie gras produced with non-force-fed birds is not one of ingredient." *Id.* The "difference is in the treatment of the birds *while alive*." *Id.* To read the PPIA's term "ingredient requirement" to encompass how an animal was raised on the farm "would require [the court] to radically expand the ordinary meaning of 'ingredient'" under federal law. *Id.*

The court made clear that its preemption analysis would not change if Section 25982 functionally barred

the sale of all foie gras in California. Pet. App. 18a. The PPIA sets standards for slaughtering, processing, and distributing poultry products. *Id.* "If foie gras is made, producers must, of course, comply with the PPIA. But if a state bans a poultry product like foie gras, there is nothing for the PPIA to regulate." *Id.*

Finally, the court rejected petitioners' arguments based on field and obstacle preemption. Pet. App. 23a-26a. Petitioners' field preemption argument "ignore[d] the states' role in poultry regulation" under the PPIA. *Id.* at 24a. And nothing in Section 25982 interferes with the PPIA's objectives of ensuring that poultry products are safe and properly labeled and packaged. *Id.* at 25a-26a.

The court of appeals reversed the district court's partial summary judgment, vacated its permanent injunction, and remanded for further proceedings. Pet. App. 26a. The court denied a petition for rehearing en banc, *id.* at 51a-52a, but stayed its mandate pending this Court's consideration of the present petition, C.A. Dkt. 57.

ARGUMENT

The court of appeals correctly held that the PPIA does not preempt California's ban on the in-state sale of products produced by force-feeding birds. That prohibition is not an "ingredient requirement" preempted by 21 U.S.C. § 467e. The decision below does not conflict with *National Meat Association v. Harris*, 565 U.S. 452 (2012), or with the other decisions petitioners cite. There is no reason for further review.

1. Petitioners argue principally that the court of appeals erred in construing the PPIA's express preemption provision, and that the court's conclusion

that California's sales ban is not a preempted "ingredient requirement" conflicts with this Court's decision in *National Meat*. Pet. i, 3, 12-16. Neither proposition is correct.

a. The PPIA's preemption provision bars States from imposing "[m]arking, labeling, packaging, or ingredient requirements" that are "in addition to, or different than" those prescribed under federal law. 21 U.S.C. § 467e. As the court of appeals concluded (Pet. App. 11a-15a), an "ingredient requirement" under the PPIA means a regulation of the physical composition of a poultry product.

The PPIA does not define the term "ingredient," but its ordinary meaning is a physical component of a product. *E.g.*, Webster's Third New Intern. Dictionary of the English Language 162 (2002) ("something that enters into a compound or is a component part of any combination or mixture: constituent" (capitalization omitted)). The PPIA and its implementing regulations use the word "ingredient" in that ordinary sense. *See, e.g.*, 21 U.S.C. § 466(a) (permitting import of poultry products if they "contain no dye, chemical, preservative, or ingredient which renders them unhealthful, unwholesome, adulterated, or unfit for human food"); 9 C.F.R. § 381.118(a)(1) (poultry product labels must contain "a statement of the ingredients in the poultry product if the product is fabricated from two or more ingredients"); Pet. App. 12a-13a (citing other examples).

The requirements that the PPIA and its implementing regulations establish with respect to these "ingredients" relate to the type and amount of ingredients that poultry products may or must contain. Agency regulations specify the "food ingredients" that

may be used in poultry products, including their permitted purposes and quantities. 9 C.F.R. § 424.21(a)(1); *see also* Food Safety & Inspection Service Directive 7120.1 ("Safe and Suitable Ingredients Used in the Production of Meat, Poultry, and Egg Products") (March 19, 2018). For example, substances like gelatin, methyl cellulose, or a "mixture of sodium alginate, calcium carbonate, lactic acid, and calcium lactate" may be used to bind or extend certain poultry products, while corn syrup and sodium acetate can be used for flavoring. 9 C.F.R. § 424.21(c) (chart). In addition, USDA regulations provide standard definitions for many poultry products and prescribe those products' constituent parts. *See id.* § 381.155(a)(1). For instance, poultry products labeled "[m]ostly white meat" must contain at least 66% light meat; products labeled "[d]ark and light meat" are required to have from 35-49%. *Id.* § 381.156 (Table I); *see also id.* §§ 381.157-381.169 (other product specifications). These regulations demonstrate that "ingredient requirements" under federal law involve the type and quantity of ingredients that may be contained in or used to process poultry products.

Section 25982 "contrasts starkly with [this] conception of 'ingredient requirements.'" Pet. App. 15a. Unlike the "ingredient" standards found in federal statutes and regulations, Section 25982 does not mandate or prohibit any substance from being added to any foie gras product. It says nothing about the physical composition of foie gras products, such as the proportion of liver meat they may or must contain. Section 25982 provides that a product may not be sold in California if it was produced from a source bird that was fed in a particular way while it was alive. Section 25982 is thus unlike the "ingredient" standards

described in the PPIA and its implementing regulations.

The purpose and scope of the PPIA confirm that "ingredient requirements" do not encompass a rule regarding the sale of products produced by use of a particular animal-feeding practice. The PPIA establishes national inspection, sanitation, and labeling standards that regulate the slaughtering and processing of poultry products. *See, e.g.*, 21 U.S. C. §§ 455 (slaughterhouse inspections), 456 (sanitary practices at slaughterhouses and processing plants), 457 (labeling and container standards), 458 (sale and transport of adulterated or misbranded poultry products). It does not extend to animal welfare on the farm or purport to address the sale of products based on how the source birds were fed. *See* H.R. Rep. No. 85-465, at 1 (original Act "does not regulate in any manner the handling, shipment, or sale of live poultry"); *Animal Legal Defense Fund v. USDA*, No. 13-55868 (9th Cir.), Dkt. 27-1 (Jan. 27, 2014), at 4, 5 (USDA brief stating that the PPIA "is wholly silent on the treatment of farm animals (including feeding procedures)" and disclaiming "authority to regulate the care or feeding of birds prior to their arrival at the slaughter facility").[1]

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[1] The PPIA defines as "adulterated" a product that "bears or contains (by reason of administration of any substance to the live poultry or otherwise)" certain added "poisonous" or "deleterious" substances. 21 U.S.C. § 453(g)(2)(A). This provision references activity occurring while a bird is alive, but it does not regulate animal treatment. It concerns substances that could remain in, and thus contaminate, a finished poultry product. Similarly, USDA regulations requiring producers to seek approval for labels making "claims regarding the raising of animals" (9 C.F.R. § 412.1(c)(3), (e); *see also* Pet. 8) do not regulate animal rearing;

To the extent petitioners suggest that USDA standards require "force-fed liver" as an "ingredient" in any foie gras product sold in the United States, that is incorrect. *See* Pet. 7; France Br. 9, 12-14. They rely on USDA's Food Standards and Labeling Policy Book, which provides labeling guidance for foie gras products based on the minimum content of liver contained in a particular product. C.A. E.R. 19-22. The guidance describes foie gras as "obtained exclusively from specially fed and fattened geese and ducks." *Id.* at 20. It does not require force-feeding birds. Pet. App. 14a, n.3.[2]

Finally, petitioners' concern (Pet. 13) that the court of appeals improperly applied a presumption against preemption in interpreting the PPIA is misplaced. In *Puerto Rico v. Franklin California Tax-Free Trust*, ___ U.S. ___, 136 S. Ct. 1938 (2016), this Court declined to invoke a presumption against preemption where the federal statute's language was "'plain'" and the Court's analysis could "begin[] and end[]" with the statutory text. *Id.* at 1946. The Court did not overrule earlier decisions directing that an express preemption provision that is reasonably susceptible to more than one interpretation should be construed narrowly in light of the States' historic police powers. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Altria*

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they merely implement the PPIA's prohibition against misleading labels. *See* 21 U.S.C. § 453(h) ("misbranded" includes labeling that "is false or misleading in any particular").

[2] The United States did not agree with France to require all foie gras sold in this country to come from force-fed birds. *See* Pet. 7; France Br. 9, 12-14. The 1984 policy memo and 1983 letter cited to support this argument focus on the different issue of developing standard labeling terminology for foie gras products. C.A. E.R. 23-24; C.A. Supp. E.R. 37-38.

Group, Inc. v. Good, 555 U.S. 70, 77 (2008). In any event, while the court of appeals in this case recited the general presumption against preemption (Pet. App. 10a, 25a), its analysis and conclusion were based on other tools of statutory interpretation. *See id.* at 11a (relying on the "ordinary meaning of 'ingredient' and the plain language and purpose of the PPIA"), 12a-13a (discussing text and statutory context), 13a-14a (congressional purpose), 14a-15a n.3 ("plain language and purpose"), 15a ("ordinary meaning," context, and purpose). The court correctly applied those tools in concluding that Section 25982 is not an "ingredient requirement" preempted by the PPIA.

b. That conclusion does not conflict with this Court's decision in *National Meat*. *See* Pet. 12-16. *National Meat* considered whether the Federal Meat Inspection Act, which contains a preemption provision substantially similar to that in the PPIA, preempted a California law prohibiting slaughterhouses from buying or receiving non-ambulatory pigs, requiring slaughterhouses to immediately and humanely euthanize such animals, and barring the sale of their meat. 565 U.S. at 458-459. The challenger there alleged that the state statute was displaced by the first sentence of the FMIA's preemption provision, which (like the PPIA's) forecloses States from adopting additional or different "[r]equirements within the scope of [the FMIA] with respect to premises, facilities and operations of any establishment at which inspection is provided." *See* 21 U.S.C. § 678; *National Meat*, 565 U.S. at 458.

This Court agreed that the FMIA preempted the state statute. It observed that the FMIA's preemption clause "sweeps widely" by preventing States from im-

posing "any additional or different—even if non-conflicting—requirements that fall within the scope of the [FMIA] and concern a slaughterhouse's facilities or operations." *National Meat*, 565 U.S. at 459-460. The State's prohibition against receiving nonambulatory pigs and its requirement that they be immediately euthanized directly regulated the handling of animals on slaughterhouse premises, and did so "in ways that the federal Act and regulations do not." *Id.* at 460.

The Court held that the State's ban on sales of meat from nonambulatory pigs was likewise preempted. *National Meat*, 565 U.S. at 463-464. It recognized that the FMIA generally does not foreclose state regulation of the commercial sales activities of slaughterhouses. *Id.* at 463. But the prohibition on the sale of meat from nonambulatory pigs functioned "as a command to slaughterhouses [how] to structure their operations." *Id.* at 464 ("[l]ike the rest of [the state statute], the sales ban regulates how slaughterhouses must deal with nonambulatory pigs on their premises"). In that circumstance, failing to extend preemption to the sales ban would allow a State to regulate slaughterhouses "just by framing [the law] as a ban on the sale of meat produced in whatever way the State disapproved." *Id.* And it was precisely the regulation of slaughterhouse activities that the FMIA reserved to federal law. *See id.* at 455-458.

Nothing in these conclusions suggests that the sales ban at issue in this case is a preempted "ingredient requirement." Significantly, *National Meat* addressed only the first sentence of the FMIA's preemption provision, which restricts state regulation of "premises, facilities and operations" of slaughterhouses and processing plants. 565 U.S. at 458. It did

not consider the meaning of the term "ingredient requirement," which is the only statutory language at issue here.

Section 25982's prohibition on in-state sales of products resulting from bird force-feeding also does not have the effect of circumventing the PPIA by indirectly regulating foie gras products' ingredients, as petitioners contend. Pet. 14. As explained above, "ingredient requirements" under the PPIA do not extend to the way a bird was fed while alive on the farm. Accordingly, a prohibition on sales of products resulting from bird force-feeding does not implicate anything that federal law forbids or addresses.

Petitioners emphasize (at 15) that *National Meat* rejected the conclusion that "'states are free to decide which animals may be turned into meat.'" 565 U.S. at 465 (quoting *National Meat Ass'n v. Brown*, 599 F.3d 1093, 1098, 1099 (9th Cir. 2010)). But what the Court explained was that the FMIA alone dictates what animals may be processed for human consumption when those animals are "on a slaughterhouse's premises." *Id.* (FMIA and its regulations "ensure that some kinds of livestock *delivered to a slaughterhouse's gates* will *not* be turned into meat" (first emphasis added)). The Court did not suggest that the FMIA negated state authority far from the slaughterhouse doors. *Cf. id.* at 467 (state bans on slaughtering horses for human consumption "work[] at a remove from the sites and activities that the FMIA most directly governs"). Nor did the Court suggest, as petitioners and their amici assert, that the FMIA compels States to permit the sale within their borders of any product that passes USDA inspection. *See* Pet. 12-13, 15-16; Poultry & Egg Ass'n Br. 7. As noted above, *National Meat* recognized that the FMIA usually does not foreclose state regulation

of the commercial sales activities of slaughterhouses. 565 U.S. at 463. The court of appeals here correctly concluded that nothing in *National Meat* suggests a need to apply any different rule under the circumstances of this case. Pet. App. 21a-23a.

2. Petitioners also seek review of their claims alleging theories of field and obstacle preemption. Pet. i, 16-19, 22-23. As an initial matter, petitioners' obstacle preemption claim is not properly framed for this Court's consideration, because neither of the questions presented includes that claim. *See* Pet. i (question 1) (reciting language of PPIA's express preemption provision); *id.* (question 2) ("[w]hether Congress has preempted the field of poultry products ingredients").

In any event, neither of petitioners' theories of implied preemption has merit. Both are simply repackaged versions of their mistaken claim that California is improperly regulating ingredients. Petitioners contend that the PPIA preempts "the field of poultry product ingredients" and establishes a national policy of uniform ingredient regulation, which inconsistent state ingredient rules impermissibly obstruct. *See* Pet. 16-19. But as explained above, Section 25982 does not regulate poultry product ingredients. Petitioners' field and obstacle preemption claims thus fail for the same reason as their express preemption claim. Moreover, any suggestion that the PPIA mandates national uniformity in all aspects of the regulation of commerce in poultry products (*see* Pet. 18-19, 22) ignores the "extensive state involvement" in poultry regulation that "the PPIA itself contemplates," Pet. App. 24a-25a (discussing provisions of PPIA preserving state regulatory authority); *see also* 21 U.S.C. § 451 (congressional finding that regulation by the

USDA "and cooperation by the States and other jurisdictions as contemplated by [the PPIA] are appropriate to" achieve various policy objectives).[3] None of petitioners' preemption theories warrants further review.

3. There is also no conflict of appellate authority requiring this Court's resolution. *See* Pet. 16-19. In *Armour & Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972), the Sixth Circuit held that a Michigan law that prescribed standards for the contents of sausage that could be sold in that State imposed "ingredient requirements" under the FMIA. *Id.* at 82-84. Under Michigan's law, saleable sausage could be made only with certain skeletal meats from cattle, swine, or sheep. *Id.* at 81. The statute prohibited the use of various animal organs; limited the permissible moisture content; required a minimum protein content; and restricted the percentage of "'trimmable fat'" in certain sausage products, among other things. *Id.* at 86-87. These standards were preempted "ingredient requirements" because they dictated the precise content of meat products. *See id.* at 83-84. The statute did not (as here) concern the sale of meat from an animal that was fed in a particular way while alive.

The Fifth Circuit's decision in *Mississippi Poultry Association v. Madigan*, 31 F.3d 293 (5th Cir. 1994) (en banc), considered whether a USDA regulation fixing inspection standards for foreign-produced poultry products was consistent with the PPIA's requirement

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[3] *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898), on which petitioners also rely (at 19), is not relevant. That case involved a Commerce Clause challenge to a prohibition on the sale of oleomargarine nearly sixty years before the PPIA was first adopted. *Schollenberger*, 171 U.S. at 6.

that imported poultry comply with the same inspection standards that apply domestically. *Id.* at 295. The case did not address the meaning of "ingredient requirement" under the Act or resolve any preemption claim, and it does not conflict with the decision below.

4. Finally, petitioners and their amici argue that the decision below will introduce confusion into the poultry regulatory system and invite state and local laws banning the sale of chicken. Pet. 20-22, 21 n.5; Reason Found. Br. 14-27; *see also* Poultry & Egg Ass'n Br. 15-17. That strained speculation provides no basis for review in this case. As far as the State is aware, this is only the second federal appellate decision to interpret the term "ingredient requirement" under the FMIA or PPIA since Congress adopted the PPIA's preemption provision fifty years ago. Consideration of the validity of a law of the sort hypothesized by petitioners can safely be postponed until one is actually enacted and sustained by the lower courts.[4] As to the law at issue here, the court below correctly held that California's prohibition on the in-state sale of products resulting from bird force-feeding is not a different or additional "ingredient requirement" preempted by federal law.

[4] The amici States cite two existing California laws that they believe exceed the State's authority. *See* States Br. 3-6 (in-state sale of fuel), 6-8 (in-state sale of shelled eggs). Neither involves processed poultry products or the PPIA's preemption of state "ingredient requirements," or provides any basis for granting review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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