No. 17-1285

IN THE

Supreme Court of the United States

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC; HVFG LLC; AND HOT'S RESTAURANT GROUP, INC.,

Petitioners,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

MICHAEL TENENBAUM
Counsel of Record
THE OFFICE OF MICHAEL TENENBAUM, ESQ.
1431 Ocean Avenue, Suite 400
Santa Monica, CA 90401-2136
(424) 246-8685
mt@post.harvard.edu

Counsel for Petitioners

RULE 29.6 STATEMENT

The disclosure statement included in the Petition for a Writ of Certiorari remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

REPLY BRIEF FOR PETITIONERS

Respondent's opposition is hatched from the same cracked egg as the Ninth Circuit's opinion, especially insofar as he, too, ignores the unanimous pronouncements of this Court in *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012). The answer to the questions presented here should be obvious. A requirement that an ingredient be sourced from a particular *type* of animal imposes, by definition, an "ingredient requirement" that is "in addition to, or different than," those under the PPIA. 21 U.S.C. § 467e. That is what the district court held in relying on this Court's instructive analysis from *National Meat*, a 9-0 reversal of the Ninth Circuit just six years ago. Yet the Ninth Circuit ignores this Court's teachings in *National Meat*, and Respondent keeps his head in the sand by not even responding to this Court's admonition not to "make a mockery of" the very same preemption clause here.

Respondent also pretends that the Ninth Circuit's holding that "Congress clearly did not intend to occupy the field of poultry products" (App. 25a) somehow does not conflict with the Sixth Circuit's point-blank holding — in a case with the identical ingredient preemption clause — that "'ingredient requirements' prescribed by the Secretary completely preempt this field of commerce." *Armour & Co. v. Ball*, 468 F.2d 76, 84 (6th Cir. 1972). That conflict is untenable.

The answers to the questions presented are also highly consequential for all meat and poultry production in the United States. As *amicus* U.S. Poultry and Egg Association explains, the Ninth Circuit's published decision "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." (U.S. Poultry & Egg Ass'n Brief at 2.) The importance of the issue is further evidenced by the *amicus* brief from 11 other States that do not produce any foie gras but recognize the far-reaching impact of the opinion below. Respondent never contests the national significance of the issues at stake here.

This case presents no vehicle issues, and Respondent does not seriously point to any. In any event, this Court need not await a "hypothesized" (Opp. 16) parade of horribles, as that parade is well under way. The Court just last month issued a CVSG in a similar case involving preemption of a California ban on certain eggs, where the legislature justified its intrusion upon USDA's authority by reference to the very statute at issue in our case. If the Court has any question about whether to hear this case, it should similarly call for the views of the Solicitor General, who we are confident will encourage a grant — and, as in *National Meat*, an ultimate finding of preemption.

I. The Brief in Opposition Illustrates the Need for This Court to Grant Review, as Respondent Merely Parrots the Ninth Circuit's Disregard of This Court's Instruction in *National Meat*.

Respondent offers no persuasive defense of the Ninth Circuit's errant decision below and no other basis for denying review. Because the PPIA does not impose *any* requirement that poultry products be produced only from birds fed in a particular way, the California statute operates to impose an "additional" and "different" ingredient requirement and is therefore preempted. 21 U.S.C. § 467e; *see also National Broiler Council v. Voss*, 44 F.3d 740, 745 (9th Cir. 1994) (affirming that "the term 'require-ments' in the PPIA pre-emption clause

unambiguously includes prohibitory enactments"). And yet, Respondent continues to defend the Ninth Circuit's disregard of this Court's directions in *National Meat*.

1. Just like the Ninth Circuit in this case, Respondent contends that the PPIA's express preemption clause "should be construed narrowly" (Opp. 10) — in spite of this Court's holding in *National Meat* that the identical preemption clause "sweeps widely." *National Meat*, 565 U.S. at 459. In *National Meat*, the Court granted certiorari where the petition asserted that the Ninth Circuit had erred in giving the FMIA's preemption clause a "*narrow* interpretation," in conflict with this Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) (emphasis added). Because the Ninth Circuit's decision now conflicts with this Court's decisions in both *Rath Packing* and *National Meat*, this petition presents an even more compelling reason than in *National Meat* for granting certiorari.

Respondent also attempts to defend the Ninth Circuit's continued reliance on a presumption against preemption. (Opp. 10-11.) Contrary to Respondent's effort to downplay its disobedience of this Court's instruction, the opinion below actually (and improperly) grounded its analysis on such a presumption based on "California's historic police powers" in the field of animal cruelty (App. 10a), an altogether *separate* subject from what "ingredients" are present in a finished poultry product. It then went even further in holding that, in light of such a presumption, "compelling evidence of an intention to preempt is required." (*Id.*) This flies in the face of this Court's repeated directions, and it calls for this Court to take up the issue here.

Respondent also never disavows the Ninth Circuit's remarkable holding — previously rejected

by this Court — that "[n]othing in the federal law or its implementing regulations limits a state's ability to regulate the *types* of poultry that may be sold for human consumption." (App. 18a.) *See National Meat*, 565 U.S. at 464 (rejecting notion that "States are free to decide which animals may be turned into meat"). Instead, Respondent defends the Ninth Circuit's view that a State can avoid the preemptive effect of the PPIA simply by pretending that the poultry never enters the system of federal inspection: "[I]f a state bans a poultry product like foie gras, there is nothing for the PPIA to regulate." (Opp. 6; App. 18a.)

Yet, as Justice Alito just wrote for the majority in *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018), the way any federal law "with preemptive effect" actually "operates" is that "[i]t confers on private entities … a federal right to engage in certain conduct subject only to certain (federal) constraints." Under this analysis, the PPIA confers on Petitioners a federal right to prepare and sell their poultry products subject only to USDA's constraints, which plainly allow (and indeed require) the inclusion of the liver of a specially fed and fattened duck. *See* 21 U.S.C. §§ 467e and 452 (declaring the policy of Congress to provide for inspection of poultry products and "otherwise regulate the processing and distribution of such articles").

Finally, Respondent acknowledges the holding in *National Meat* that, under a virtually identical pre-emption clause, States are prohibited from imposing "any additional or different — even if non-conflicting — requirements that fall within the scope" of those statutes. (Opp. 11-12, citing *National Meat*, 565 U.S. at 459-60.) Otherwise, "any State could impose any regulation" "just by framing it as a ban on the sale of

meat produced in whatever way the State disapproved," which "would make a mockery of the [federal statute's] preemption provision." *Id.* at 464. Yet Respondent studiously avoids dealing with this Court's directive that a State may not use a ban on sale to prohibit indirectly what it may not regulate directly (i.e., ingredients in poultry products). And, like the Ninth Circuit below, he never mentions the term "mockery," let alone how a "mockery" is not the inevitable result if the opinion below is left to stand.

2. The Ninth Circuit's split with the Sixth Circuit, on the question of whether the PPIA preempts the field of poultry products ingredients, provides a further basis to grant the petition. Its holding, that "Congress clearly did not intend to occupy the field of poultry products" (App. 25a), runs smack into the Sixth Circuit's holding — in a case with the identical ingredient preemption clause — that "'ingredient requirements' prescribed by the Secretary *completely preempt* this field of commerce." *Armour & Co. v. Ball*, 468 F.2d 76, 84 (6th Cir. 1972) (emphasis added); *see also Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 296 (5th Cir. 1994) ("The PPIA created one uniform regulatory scheme for the national market.").[1]

Respondent's only answer is to insist that the California statute "does not regulate poultry product

---

[1] Respondent seeks to bar this Court's from considering how the California statute is preempted by "obstacle" preemption (Opp. 14), a species of "conflict" preemption. But Rule 14.1(a) provides for consideration of the questions "set out in the petition, *or fairly included therein*." In any event, as this Court just held in analyzing "express," "field," and "conflict" preemption, "all of them work in the same way: … a state law confers rights or imposes restrictions that conflict with the federal law …." *Murphy*, 138 S. Ct. at 1480 ("'Express preemption' operates in essentially the same way" as conflict preemption.).

ingredients." (Opp. 14.) But this does nothing more than invite review of the very merits of this case. As this Court explained earlier this month, field preemption "operates" in the same way as express and conflict preemption such that, where Congress "provide[s] a full set of standards" in a particular area, it not only imposes federal obligations on the regulated individuals "but also confer[s] a right to be free from any other [state] requirements." *Murphy*, 138 S. Ct. at 1481. That is equally true for the petitioning poultry producers here.

Respondent posits that "this is only the second federal appellate decision to interpret the term 'ingredient requirement' under the FMIA or PPIA." (Opp. 16.)[2] But the scope of these statutes is so important that, when this Court granted cert in *National Meat*, it did so despite the fact that there were *zero* other circuit cases interpreting the preemption clause at issue. *See also Dawson Chem. co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 & n.4 (1980) (noting certiorari granted "to forestall a possible conflict in the lower courts" on an "important issue").

There is no need to wait for a circuit split to spread. Indeed, there was no such need in *National Meat* (which did not even present a circuit split), and this Court readily recognized the need for its intervention. That imperative is even stronger here, where the Ninth Circuit continues to depart from this Court's teachings and where the broader poultry industry and voices from Canada to France are urging review.

---

[2] In recounting the history leading to a prior petition in this case, footnote 1 of the petition indicated that the Court had called for a response from California; in fact, California filed a response without having been requested to do so.

II. The Range of Influential *Amici* Speaks to the Important Consequences of this Case for the Nation's Meat and Poultry Industry.

One thing is clear from the expression of amicus support here: this case raises foundational questions of federalism well beyond the parties' fight over foie gras. This case impacts all meat and poultry producers, both at home and in other countries like Canada, whose producers are part of an enormous trading bloc with the United States. Moreover, far beyond the pork produced from non-ambulatory pigs in *National Meat*, there is no more controversial USDA-approved food in America — and thus no better context for the Court to consider the competing interests in Congress's regulation of the Nation's food supply.

In the first place, it speaks volumes about the stakes of this case that none of the 11 other *amici* States that are urging this Court to grant review is home to farmers who produce the duck liver products that Petitioners do. But what each of these separate sovereigns recognizes is that California is *not* "free to decide which animals may be turned into meat," especially where it uses a ban on sale of wholesome meat and poultry products to express its disapproval of how animals are raised in *other* States. (Missouri *et al.* Brief at 1.) States like Arkansas and Texas may not be founts of foie gras, but they have a firm grasp on the Constitution's framework of federalism.

Notably, Michigan had once argued *against* pre-emption under an identical provision of the FMIA concerning the "ingredients" in sausage. No doubt as a result of the finding of preemption in *Armour & Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972), Michigan now joins ten other States in recognizing the preemptive effect of the federal meat and poultry inspection

statutes — and in encouraging this Court to grant the petition here. As amicus U.S. Poultry and Egg Association further explains, "this Court's intervention is necessary to forestall pervasive disruptions and serious dislocations in the poultry and egg industry, which would prove injurious … to consumers nationwide." (U.S. Poultry & Egg Ass'n Brief at 3.) This is exactly what Congress enacted the PPIA to avoid.

France warns that, if the opinion below is left to stand, "the sale of USDA-approved poultry (or meat) products … will be left vulnerable to the political whims of fifty different state governments." (France Brief at 3.) A $20 billion Canadian trade association explains that they seek protection "from the burden of complying with a patchwork of federal, state and local regulations, and having their food exports, which fully comply with USDA regulations, boycotted by state and local governments that impose additional or different requirements." (CTAQ Brief at 3.) And two respected public policy organizations observe that, "[i]f this Court allows states to prohibit interstate commerce in poultry products …, then laws like these from California, Massachusetts, and other states could ultimately destroy our national market in food." (Reason/Cato Brief at 17.)

III. Respondent Does Not Dispute that This Case Is an Excellent Vehicle — or that the Court Should Solicit the Views of the Solicitor General.

Respondent points to nothing in this case that would render it an unsuitable vehicle for the Court to address the vital questions presented. Instead, Respondent makes the same unsuccessful arguments he did in *National Meat*. (*See* Table of Contents, Brief in Opp. to Pet. in No. 10-224, available at

https://perma.cc/UJ9D-YHCV.) Indeed, the brief in opposition here only further invites review of a key issue left open by the opinion in *National Meat*.

In *National Meat*, this Court noted that States may impose civil penalties for animal cruelty or for "other conduct that also violates" a federal statute like the PPIA. *Id.* at 467 n.10. The PPIA arguably "thus leaves some room for the States to regulate." *Id.* This case presents the Court with an ideal opportunity to define the contours of the preemption clause and of its holding in *National Meat*.

Respondent directs this Court (Opp. 9) to a USDA brief from a *different* case involving foie gras, which Respondent claims reflects the views of the federal government on the scope of the PPIA. But this Court need not guess about USDA's views on the issues of federal preemption. The Court can — and, if it does not grant certiorari outright, should — call for the views of the Solicitor General on the issues raised in this petition, as it did in *National Meat*.

Meanwhile, there has been a notable development since the filing of our petition. In a case raising an almost identical preemption issue — a California ban on the sale of *eggs* from poultry birds raised in a way the State disapproves — this Court just issued a CVSG on Missouri's (and 12 others States') bill of complaint. There, the federal Egg Products Inspection Act (EPIA), like the PPIA here, includes a preemption clause prohibiting state standards "in addition to or different from the official Federal Standards." (*See Missouri v. California*, No. 22O148, Bill of Compl. ¶ 43, citing 21 U.S.C. § 1052(b).) There, like here, the challengers assert that California's standards "are in 'addition to and different from' federal standards" for egg production and that "[n]o federal standard imposes any comparable requirements." (*Id.* at ¶ 70.) There, like

here, they cite Congress's interest in "national uniform standards" and this Court's holding in *National Meat*. (*Id*. at ¶ 45.)

Indeed, in enacting its ban on eggs produced in a way California disfavors, the California legislature relied on the *very statute* we challenge in this case, which had yet to take effect. Cal. Senate Floor Analysis, A.B. 1437, at 2 (Jun. 16, 2010).

Evidently recognizing that California is again clashing with the federal government over USDA-approved meat and poultry products, this Court on April 16, 2018, called for the views of the Solicitor General. (On that same date, the Court also issued a CVSG in the related case of *Indiana v. Massachusetts*, No. 22O149.) With the Solicitor General already examining the scope of EPIA preemption on poultry eggs, there would be a practical efficiency to having his office simultaneously address the same issue concerning the scope of PPIA preemption on other poultry products, such as Petitioners' here.

In *National Meat*, the United States was asked for its views at the certiorari stage and weighed in at the merits stage in favor of a finding of preemption. Respondent notably does not disagree with the sensible suggestion to solicit the Solicitor General's views at this stage.

* * *

The district court's permanent injunction against California's enforcement of section 25982 has been in effect since January 2015. Petitioners obtained a stay of the Ninth Circuit's mandate pending this Court's certiorari decision, as even the panel that reversed the district court recognized that the petition here would present a "substantial question" of nationwide significance. As the lower courts here have found, Petitioners will suffer irreparable harm

if the California law at issue were to go back into effect. The need for this Court to grant certiorari is critical.

The petition presents a textbook example of when certiorari is necessary. It concerns the constitutionality of a state statute. It raises key questions of federalism. It involves the Ninth Circuit's disregard of this Court's unanimous precedent. It includes a square circuit conflict on a question of preemption. It affects meat and poultry interests well beyond Petitioners, with *amici* from Canada and the French government urging a grant. And it is fully ripe for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL TENENBAUM
Counsel of Record
THE OFFICE OF MICHAEL TENENBAUM, ESQ.
1431 Ocean Avenue, Suite 400
Santa Monica, CA 90401-2136
(424) 246-8685
mt@post.harvard.edu

Counsel for Petitioners

May 29, 2018