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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTRODUCTION

There is something about foie gras that elevates foodies to a higher state of consciousness — and that seems to have the opposite effect on some lawyers and judges. While he regrettably falls for the Ninth Circuit's mischaracterization of the record, the Solicitor General recognizes that this case presents a "difficult question" for the Court. (U.S. Br. 15.) Indeed, the Petition calls for the interpretation of a vital federal statute that governs the production of ***all*** poultry products in America, including even "barbecued chicken." (*Id.* 12-13.) What remains undisputed, after all the briefing at this stage, is that this case presents a question of extraordinary — and timely — importance to the Nation's poultry industry and to the States and other *amici* urging review.

The United States errs in endorsing the Ninth Circuit's narrow reading of *National Meat*. Can a State force poultry processors to include only "organic" chicken in their products — and somehow avoid the PPIA's express preemption of "addition[al]" or "different" ingredient requirements, 21 U.S.C. § 467e — merely by phrasing the ban on any product that is not "the result of" organic farming, i.e., the way California has framed its law here? Not according to this Court. "[I]ndeed, if the sales ban were to avoid the FMIA's [identical] preemption clause, then any State could impose any regulation on [official establishments] just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the [statute's] preemption provision." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012).

Moreover, the Solicitor General never even addresses the Ninth Circuit's remarkable holding 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.) His brief also does not even attempt to defend the Ninth Circuit's equally remarkable claim that, if a State bans a poultry product altogether, "there is nothing for the PPIA to regulate." (*Id.*) But ducking these issues does not make the holdings any less indefensible.

Whether a prohibition on a poultry product based on the provenance of its primary ingredient imposes a requirement on that ingredient under the PPIA — the "difficult question" the United States spends almost its entire brief debating — is a question that should be resolved at the merits stage. And it is massively consequential. The Ninth Circuit now allows States to ban federally-approved poultry (and meat) products by prohibiting their primary ingredient if it comes from an animal raised in whatever way a State disapproves — whether force-fed or organic, without hormones or with antibiotics. No wonder 11 States and the U.S. Poultry & Egg Association, representing producers of billions of chickens, are imploring the Court to grant review.

This case has now taken the same path as *National Meat*, where, like here, the district court got it right, but the Ninth Circuit told the processors that "States are free to decide which animals may be turned into meat," 599 F.3d at 1093 — only to have this Court reject that notion. 565 U.S. at 465 ("We think not."). In *National Meat*, the Solicitor General had failed to see the importance of the case at the petition stage and recommended a denial. The producers found justice when this Court nonetheless granted their petition — and issued a unanimous reversal, as it should do here as well.

In fact, because this case arrives at the Court following a final judgment — and involves a poultry ingredient that is the *pièce de résistance* in the battle between animal rights activists and American farmers — this case comes to the Court on a proverbial silver platter.

I. Though Its Faith in the Ninth Circuit's Opinion Is Misplaced, the United States Still Sees This Case as Presenting a "Difficult Question" for the Court.

The United States recognizes that the Petition presents a "difficult question" for the Court to resolve. (U.S. Br. 15.) Indeed, the United States takes the view that "a state law that prohibited the only extant methods for producing products containing certain ingredients may be preempted by the PPIA." (*Id.*) Yet, in suggesting that the Court's review somehow depends on whether foie gras — which, like chicken breast, is indisputably an ingredient in poultry products — can be produced in more than one way, the United States fell for a decoy left out by the Ninth Circuit.

1. The United States uncritically repeats the Ninth Circuit's misstatement that "nothing in the record *** shows that force-feeding is *required* to produce foie gras." (U.S. Br. 14.) Like most of the Ninth Circuit's opinion, this is demonstrably wrong. In obtaining summary judgment, Petitioners submitted declarations from the leading producers of foie gras for North America. Messrs. Cuchet and Henley each stated, with years of experience, that they were "unaware of any verified method of producing foie gras from ducks without using a tube." (CA9.Dkt.27 at SER041, 048.)

Moreover, while the Ninth Circuit failed to even mention it, the United States acknowledges that USDA's very definition of foie gras is liver "obtained ***exclusively*** from specially fed and fattened geese and ducks." (U.S. Br. 5 [emphasis added].) The district court had also noted that "it appears that foie gras is the only product sold that ***requires a bird to be force-fed.***" (CA9.Dkt.47 at 1-2 [emphasis added].) And USDA itself even recognized, in a case to which California referred the Ninth Circuit, that an "attempt to maintain a distinction between force-fed foie gras and non-force fed foie gras is untenable as any product labeled 'foie gras' is almost certainly the product of a force-feeding process." (*Id.*)

This is not "nothing in the record," as the Ninth Circuit incredibly stated — and as the United States' brief blindly quotes. (U.S. Br. 14.) Petitioners even cited this evidence to the panel at argument. (CA9.Hr'g.Aud. 13:43-14:05.) And California did not submit ***any*** contrary evidence. There is thus no "gap" in the record that would create a vehicle issue. Indeed, the Ninth Circuit was so desperate to save the California law that it resorted to extra-record references to double-hearsay from a TED talk and NPR story about a farmer who reportedly raises different animals (geese) in another country (Spain). (App. 17a n.5.)

2. In any event, to fixate on whether there is more than one way to produce a poultry ingredient is to focus on an irrelevancy. The PPIA allows poultry to be included in poultry products ***regardless*** of how it is produced, i.e., without any "addition[al]" or "different" requirement that the ingredient be derived from the carcass of a bird that was raised in any particular way. Nevertheless, the United States' brief now offers yet a third interpretation of the

PPIA's preemption clause, which differs from those of the two lower courts.

The Ninth Circuit — declaring that "*National Meat* does not apply here" (App. 22a) — held that whether a poultry ingredient can be produced in only a single way was irrelevant, since "even if section 25982 results in the total ban of foie gras regardless of its production method, it would still not run afoul of the PPIA's preemption clause." (App. 18a.) In the panel's view, "[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." (*Id.*)

The district court — concluding that "the best approach is to apply *National Meat*'s reasoning to reach a result consistent with the goals that the Supreme Court embraced" (App. 49a) — ruled that whether there is more than one way to produce a poultry ingredient was ***irrelevant*** because the California law "imposes an ingredient requirement ***regardless*** of whether foie gras can be produced without force feeding," and "it does not matter whether foie gras obtained from force-fed birds is a different product from non-force-fed bird foie gras" because "[i]t is undisputed that the PPIA and its implementing regulations do not impose any requirement that foie gras be made with liver from non-force-fed birds." (App. 43a-44a [emphasis added].) This logic is irrefutable — and unrefuted.

The United States — promoting a novel (yet equally irrelevant) third view — now suggests that whether the PPIA preempts a state law that prohibits a poultry ingredient based on its provenance somehow depends on whether it makes the ingredient "unavailable": "If in fact Section

25982 did operate to make unavailable in the State any poultry products containing foie gras … it would present a more difficult question." (U.S. Br. 14-15.) And the ***only*** reason the United States gives for the Court not to address the "difficult question" this case presents — whether a state law is "preempted if, as applied, it operate[s] to ban a particular substance in a poultry product" (at 15) — is, as explained above, the Solicitor General's conjecture about alternative methods of foie gras production.

3. Take the "barbecued chicken" example given by the United States. (U.S. Br. 12-13.) The PPIA does not require that all chicken breast used for barbecued chicken be organic — or the result of any particular production method. If, as the United States admits (at 12-13), a state law requiring barbecued chicken "to be basted with a particular ***type*** of sauce [] would be preempted," then one cannot argue with a straight face that a state law requiring it to be made only with organic chicken breast — or the breast of any other ***type*** of chicken — does not also impose an "addition[al]" or "different" requirement on the ingredients in that poultry product. 21 U.S.C. § 467e. The same is true for Petitioners' duck products here.

In any event, apart from an imaginary *counter*-factual, the United States points to no actual vehicle issue at all. The Court should grant the Petition to decide the important first question on which the Ninth Circuit has again defied both common sense and this Court's teachings.

II. The Ninth Circuit's "Types of Poultry" Analysis Continues to "Make a Mockery" of the PPIA and of *National Meat* — in which this Court Granted Review Despite the United States' Contrary Recommendation.

1. The Solicitor General does not even mention — let alone disavow — the Ninth Circuit's dangerous holding 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.) Yet this holding flouts this Court's rejection of the Ninth Circuit's similar holding in *National Meat* that "States are free to decide which animals may be turned into meat." 565 U.S. at 464 ("We think not."). Here, the PPIA expressly preempts California from imposing a requirement that poultry ingredients be derived from any particular ***type*** of animal.

In *National Meat*, under a virtually identical pre-emption clause, this Court held that States are prohibited from imposing "any additional or different — ***even if non-conflicting*** — requirements that fall within the scope" of the federal statutes. 565 U.S. at 459-60 (emphasis added). The United States suggests that "Section 25982 is not preempted by the PPIA because petitioners have not shown that it imposes a requirement on the subjects Section 467e enumerates." (U.S. Br. 17.) But that just begs the question.

USDA has made a judgment that livers from force-fed ducks are ingredients fit to be turned into poultry products. In fact, to omit this most "valuable constituent" from Petitioners' products would render them "adulterated" (a criterion the United States fails to include). 21 U.S.C. § 453(g)(8); 9 C.F.R.

§ 381.1(b). California is thus not permitted to reach a different judgment on that same subject.

The district court's reasoning is unassailable:

> Plaintiffs' foie gras products may comply with all federal requirements but still violate § 25982 because their products contain a particular constituent — force-fed bird's liver. Accordingly, § 25982 imposes an ingredient requirement in addition to or different than the federal laws and regulations. (App. 44a.)

Or, as the United States put it at the merits stage in *National Meat*, "The FMIA [like the PPIA] leaves certain matters to the States — such as intrastate inspection programs — but federal law forbids a State from engrafting its preferred additions onto the federal scheme." (U.S. Merits Br. in No. 10-224 at 15.) See also Pet. Reply 4.

2. Even putting aside the conflict between the circuits on the question of field preemption, the United States' argument against conflict preemption misses the mark. Section 25982 bans Petitioners' poultry products by punishing a seller in California whose products include an ingredient that federal law explicitly allows. To claim that the statute prohibits a "feeding practice that occurs far away from the official establishments that the PPIA regulates" is to conflate section 25982 with California's separate statute that bans the practice of force feeding itself, i.e., section 2598*1*. (U.S. Br. 19.) The district court recognized this basic distinction (App. 43a); the Ninth Circuit, and now the United States, missed it altogether.

3. The United States inexplicably departs from its previous views on PPIA preemption. In *Northwestern Selecta, Inc. v. Munoz*, 106 F.Supp.2d

223 (D.P.R. 2000), USDA explained: "[I]f poultry products are wholesome, unadulterated, and properly branded, ***Congress clearly intended to protect the flow of these products in interstate commerce***"; "Federal law also anticipates that frozen poultry can be unloaded, distributed, or ***sold at any time after inspection as long as the poultry is in conformance with the PPIA***"; and "[t]hus, one of Congress's purposes in passing the Act was to ***protect interstate markets for poultry products that satisfy the federal standards***." (USDA Br. in D.P.R. No. 00-1106CCC at 16-17 [emphasis added].)

The Solicitor General's brief today instead endorses the Ninth Circuit's errant reasoning from *National Meat*:

> What if a state wanted to ban the slaughter of a specific breed of pig but not the entire species? … Or, perhaps due to ethical concerns, prohibited the slaughter of … non-free-range animals? Regulating what ***kinds of animals*** may be slaughtered calls for a host of practical, moral and public health judgments that go far beyond those made in the FMIA. These are the kinds of judgments reserved to the states …. Federal law regulates the meat inspection process; states are free to decide which animals may be turned into meat.

599 F.3d at 1099 (emphasis added). Yet, as the United States rightly observed at the merits stage in this Court: "***That reasoning is flawed. The court's 'kind of animal' criterion has no basis in the text of [the federal statute]***." (U.S. Merits Br. in 10-224 at 14.) Not surprisingly, this Court likewise flatly rejected that reasoning: "We think not." 565 U.S. at 465.

That is part of why this case is so certworthy.

The Ninth Circuit's opinion simply defies what the Solicitor General and this Court made clear just six years ago in *National Meat*. And it warrants the same 9-0 reversal. This case has followed the same trajectory as *National Meat*, and just like in that case — i.e., notwithstanding the United States' contrary view — certiorari should be granted.

III. The United States Does Not Dispute the National Importance of this Case — and Recent Events Only Confirm the Timeliness of the Questions Presented.

The United States notably never questions the national importance of this case. Nor could it, in the face of amicus briefs from 11 other States, the U.S. Poultry & Egg Association, a Canadian trade consortium representing billions of dollars of food production, and the government of France, among others, urging the Court to take up the questions presented.

Under the Ninth Circuit's published opinion, States are now free to ban ***any*** meat or poultry from farm-raised animals — as long as they omit the word "ingredient" and "fram[e] it as a ban on the sale of meat produced in whatever way the State disapprove[s]." *Id.* at 464. What's next? See *Would You Eat Chicken Grown in a Lab?* BBC (Mar. 20, 2018), https://www.bbc.com/news/business-43259905 ("In a lab in California, Josh Tetrick's team at Just has been growing chicken and foie gras."); see also *Lab-Grown Meat — Meat Produced Without Killing Animals Is Heading to Your Dinner Table*, Scientific American (Sep. 14, 2018), https://www.scientificamerican.com/article/lab-grown-meat/. Just last month, USDA laid claim to "the statutory authority

necessary to appropriately regulate cell-cultured food products derived from livestock and poultry." USDA Release No. 0248.18 at https://www.usda.gov/media/press-releases/2018/11/16/statement-usda-secretary-perdue-and-fda-commissioner-gottlieb. Would the United States argue at the merits stage that a State may now ban federally-approved poultry products that are (or are not) "the result of" feeding animals for slaughter?

In *National Meat*, the Court recognized the need for its intervention in cases involving the Nation's food supply. Like the FMIA, the PPIA reflects Congress's intent not just to "eliminate burdens" on commerce in poultry products but to "prevent them." 21 U.S.C. § 451. That is no doubt why the Court granted cert despite the fact that there were no other cases interpreting the preemption clause at issue, let alone a split. Indeed, the Court granted cert where the number of non-ambulatory pigs was as few as 100,000. 565 U.S. at 460 n.5. Here, Petitioners alone process ingredients from more than half a million ducks that have been fed "more food than a typical bird would consume," i.e., just like ***every*** animal that farmers raise for food.

California is again ignoring principles of federalism in attempting to dictate how federally-inspected products must be produced, with more than a dozen States seeking leave to sue California in this Court to enforce respect for Congress's objective of national uniformity. *Missouri v. California*, No. 22O148. In comparison, our Petition is a clean vehicle arriving at the Court following a final judgment. And our case — which involves arguably the most controversial production method in agriculture — presents a better crucible for what the United States acknowledges is a "difficult question" of preemption.

* * *

The Court should not push off resolving the questions presented while California continues removing wholesome, federally-approved poultry products from people's plates. With apologies to Martin Niemöller,[1] "First they came for the foie gras …."

CONCLUSION

The Petition 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

December 21, 2018

[1] Twentieth-century German theologian (and fellow Dachau inmate with the father of Petitioners' counsel, both liberated in April 1945).