No. _____

IN THE

Supreme Court of the United States

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC; HVFG LLC; AND SEAN "HOT" CHANEY,

Petitioners,

v.

ROB BONTA, 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

All poultry products — from chicken tenders to foie gras — must pass federal inspection for sale in commerce under the Poultry Products Inspection Act, which expressly preempts any additional or different "ingredient requirements." 21 U.S.C. § 467e. In *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012), this Court unanimously held that a State may not avoid preemption of a state regulation "just by framing it as a ban on the sale of meat produced in whatever way the State disapproved" since "[t]hat would make a mockery of the FMIA's preemption provision."

In the split opinion below, the Ninth Circuit upheld California's ban on wholesome poultry products based on the way the primary ingredient is produced, creating a "head-on collision" with this Court's precedents and deviating from other circuits.

The questions presented are:

1. Whether a State may avoid express ingredient preemption under the Poultry Products Inspection Act by banning the sale of poultry products based on the only way their primary ingredient can be produced.

2. Whether a state law that makes it physically impossible to produce and sell a poultry product in compliance with both state and federal law is preempted under the doctrine of impossibility preemption or whether a State may avoid preemption under the "stop-selling" rationale this Court rejected in *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013).

3. Whether a State's sales ban of wholesome poultry products based exclusively on the farming practice by which the animals were raised in other States and countries violates this Court's dormant Commerce Clause doctrines.

RULE 29.6 STATEMENT

Association des Éleveurs de Canards et d'Oies du Québec (Canadian Farmers) is a Canadian non-profit corporation representing the interests of duck and goose farmers who export their USDA-approved poultry products for sale in the United States. The Canadian Farmers have no parent corporation, and no publicly held company has a 10% or greater ownership interest in the Canadian Farmers.

HVFG LLC, which is known as Hudson Valley Foie Gras (Hudson Valley), is a New York limited liability company that produces USDA-approved poultry products for sale throughout the United States. Hudson Valley has no parent corporation, and no publicly held company has a 10% or greater ownership interest in Hudson Valley.

Sean "Hot" Chaney is a chef and restaurateur who would like to resume selling foie gras products in California.

STATEMENT OF RELATED PROCEEDINGS

This petition arises from the following directly related proceedings within the meaning of Rule 14.1(b)(iii):

U.S. Court of Appeals for the Ninth Circuit

Ass'n des Éleveurs de Canards et d'Oies du Québec v. Bonta, Case Nos. 20-55882 and 20-55944. Judgment entered May 6, 2022.

U.S. District Court for the Central District of California

Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra, Case No. 2:12-cv-05735-SVW-RZ. Judgment entered Jul. 23, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Association des Éleveurs de Canards et d'Oies du Québec, HVFG LLC, and Sean "Hot" Chaney respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's published majority and dissenting opinions are reported at 33 F.4th 1107 and reprinted in the Appendix (App.) at 1-47. The Ninth Circuit's order denying rehearing *en banc* is reprinted at App. 84-85. The district court's orders are reprinted at App. 48-60, 63-79, and 80-83.

JURISDICTION

The Ninth Circuit filed its opinion on May 6, 2022. App. 1. It denied Petitioners' timely petition for rehearing en banc on July 1, 2022. App. 84. On September 20, 2022, Justice Kagan extended the time for filing this petition until November 14, 2022. *See Ass'n des Éleveurs de Canards et d'Oies du Québec v. Bonta*, No. 22A242 (U.S. 2022). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States[.]" U.S. Const. art. I, § 8, cl. 3.

The federal Poultry Products Inspection Act provides in relevant part:

> [I]ngredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) 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[.]

21 U.S.C. 467e.

The California statute that Petitioners challenge here provides:

> A product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size.

Cal. Health & Safety Code § 25982.

INTRODUCTION

This case happens to involve foie gras, perhaps the most maligned and misunderstood food in the world. But the fundamental issues it raises — of both vertical and horizontal federalism — affect our Nation's entire supply of meat and poultry products.

Does a producer's compliance with the federal government's uniform ingredient requirements for the sale of meat and poultry products, under an express preemption clause, provide it with little more than a Good Housekeeping seal of approval, to be disregarded by any State that seeks to ban such wholesome products? Are States now free to ban each other's agricultural output whenever they disapprove of the way the farm animals or even the farm workers themselves spend their lives in those other States? Without intervention from this Court in this touchstone case, the trend to date is demonstrably and dangerously in that direction.

Petitioners, an association of Canadian farmers and Hudson Valley Foie Gras, are farmers and producers of poultry products in Quebec and in the town of Liberty, New York. They raise ducks to produce the fatty liver known as foie gras. It should go without saying, but the farmers are law-abiding citizens who fully comply with their jurisdictions' strict laws to ensure the protection of animals and who care about their animals just as much as any California politician or animal-rights activist may claim, not least because their livelihoods depend upon it.

The two-judge majority in this case held that California, and, by extension, any State or every

State, may ban the sale of perfectly wholesome poultry products despite their having passed federal inspection for "sale in commerce, as articles intended for use as human food," as required by Congress under the Poultry Products Inspection Act (PPIA) and its implementing regulations. 9 C.F.R. § 381.6(a).

The majority's view is that, where the federal government requires that the primary ingredient in such a product be "obtained exclusively" from animals that were fed and fattened in a particular way, a State like California can nevertheless require that the product *not* be the result of that very feeding method — making it impossible for Petitioners to produce their products for sale in compliance with both federal and state law — and yet escape this Court's impossibility preemption jurisprudence because, the majority says, Petitioners can avoid this conflict if they simply "stop selling" their federally-approved products in California.

Here, the dissent got it right. The majority's opinion conflicts with the express holdings and the sound rationale of multiple decisions of this Court, including but not limited to *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013) (rejecting "stop-selling rationale" as "incompatible with our jurisprudence"), *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012) ("According to the Court of Appeals, 'states are free to decide which animals may be turned into meat.' We think not."), and *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (finding preemption "inescapable" "where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce").

The majority's opinion also conflicts with longstanding precedent from, *inter alia*, the Sixth Circuit in *Armour & Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972) ("[A] state would not be permitted to prevent the distribution in commerce of any article that 'conforms' to the [federal] 'definition and standard of identity or composition.'"). Review by this Court is therefore necessary to secure and maintain compliance with its decisions and uniformity among the circuits.

Furthermore, because a separate (and unchallenged) California statute eliminates the practice of force feeding in California, § 25982 does not serve to protect a single duck or goose in the State. But that has not stopped California from applying its ban to the wholesome poultry products produced by Petitioners far outside its borders — based entirely on farmers' conduct in other states and even other countries. Just like the statute in *Nat'l Pork Producers Council v. Ross*, No. 21-468 (*NPPC*), in its practical effect, § 25982 is thus an unconstitutional extraterritorial regulation.

And, while § 25982 decimates the interstate market for foie gras products, it does so without promoting any "legitimate local interest" — certainly not the welfare of any bird in California and especially not when California's own Department of Food and Agriculture has recognized that the production of foie gras "does not involve cruelty at any time." CA9.20-55882.Dkt.30 at SER-073. Indeed, the Solicitor General of the United States emphasized to this Court in a similar case just this year: "California 'has no legitimate interest in protecting' the welfare of animals located outside the

State." Br. U.S. at 10 in *NPPC*, No. 21-468 (U.S. Jun. 17, 2022), citing *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982).

* * *

Petitioners respectfully request:

(1) that the petition now be granted in full as to the three pressing questions presented, which are ripe for review (and for reversal of the Ninth Circuit);

(2) that, if it has any concern, the Court alternatively call for the views of the Solicitor General of the United States — as it did both in the analogous *National Meat* case as well as on a prior petition in *this* case, and especially in light of Petitioners' having now established precisely the "critical premise" that her office had explained would present the "difficult" preemption questions for this Court's review; and

(3) in any event, given the substantial overlap with the questions under the dormant Commerce Clause in this case, that the Court at least hold the petition pending its decision in *Nat'l Pork Producers Council v. Ross*, No. 21-468 (argued Oct. 11, 2022).

STATEMENT OF THE CASE

A. Federal Regulation of Poultry Products.

1. All poultry products sold in commerce in the United States are subject to the federal Poultry Products Inspection Act. 21 U.S.C. § 451 *et seq*. The PPIA declares Congress's intent: "Poultry and

poultry products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion moves in interstate or foreign commerce. . . . [R]egulation by the Secretary of Agriculture and cooperation by the States . . . as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers." 21 U.S.C. § 451.

Section 452 of the PPIA declares "the policy of the Congress" to provide for the inspection of poultry products and to "otherwise regulate the processing and distribution of such articles as hereinafter prescribed to prevent the movement or sale in interstate or foreign commerce of, or the burdening of such commerce by, poultry products which are adulterated or misbranded." 21 U.S.C. § 452; 9 C.F.R. § 381.1(b)(viii). A poultry product is deemed "*adulterated*" if, *inter alia*, "any *valuable constituent* has been in whole or in part omitted or abstracted therefrom[.]" 21 U.S.C. § 453(g)(8) (emphasis added); 9 C.F.R. § 381.1(b)(viii).

Federal law governs what poultry products may be sold in the U.S. and mandates that they include all "valuable constituents," contain all conforming "ingredients," and meet the "definition and standard of identity or composition" established by USDA.

2. Under § 457 of the PPIA, the Secretary of Agriculture, "whenever he determines such action is necessary for the protection of the public, may prescribe … definitions and standards of identity or composition [f]or articles subject to this chapter[.]" 21 U.S.C. § 457(b)(2). Federal regulations further

reflect that the Secretary of Agriculture has delegated to the Administrator of the Food Safety and Inspection Service (FSIS) within USDA "the responsibility for exercising the functions of the Secretary of Agriculture under various statutes." 9 C.F.R. §§ 300.2(a), 300.4(a).

As authorized by Congress, USDA has established the ingredient requirements for virtually every poultry product, ranging from *arroz con pollo* to turkey chops. USDA regulations authorize the Administrator "to establish specifications or definitions and standards of identity or composition, covering the principal constituents of any poultry product with respect to which a specified name of the product or other labeling terminology may be used, whenever he determines such action is necessary to prevent sale of the product under false or misleading labeling." 9 C.F.R. § 381.155(a)(1). "Further, the Administrator is authorized 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*.

Federal inspection by USDA is required at every establishment in which poultry products are "processed for transportation or *sale in commerce*, as articles intended for use as human food." 9 C.F.R. §§ 381.1, 381.6(a) (emphasis added).

3. Like it or not, foie gras is just another poultry product that, as approved by USDA, is certified for sale throughout the United States as wholesome and unadulterated. It is uncontested in this case that foie gras is an "ingredient" in Petitioners' poultry products under the PPIA and USDA's implementing

regulations. *See, e.g.*, 9 C.F.R. § 381.118(b) (referring to poultry "giblets" as "ingredients of poultry products") and 9 C.F.R. § 381.1 (defining "giblets" as including the "liver").

Foie gras is federally-approved both as a "single-ingredient" USDA-approved poultry product, just like "chicken breast," 9 C.F.R. § 381.444, and as a primary ingredient in other USDA-approved poultry products ranging from "Pate of Duck Liver" to "Whole Duck Foie Gras." *See* tinyurl.com/FSISStandards. Pursuant to its congressional authority, USDA has prescribed definitions and standards of identity or composition in its Food Standards and Labeling Policy Book for no less than 14 poultry products containing foie gras. *Id*. As evidenced in the record, USDA requires "minimum duck liver or goose liver foie gras content" ranging from 50%, 85%, or 100% in these foie gras products. CA9.20-55882.Dkt.30 at SER-210.

These ingredient requirements were the result of negotiations between USDA and the French government in the 1970s, as reflected in USDA policy memos. CA9.20-55882.Dkt.30 at SER-210. Indeed, USDA defines the duck liver ingredient in foie gras products as "***obtained exclusively from specially fed and fattened geese and ducks***." *Id*. The liver from these force-fed ducks is the most valuable constituent in these poultry products, and the PPIA states that these products would be "*adulterated*" "if any valuable constituent has been in whole or in part omitted or abstracted therefrom." 21 U.S.C. § 453(g)(8); *see also* 9 C.F.R. 381.1(b).

While USDA does not directly regulate the feeding of ducks on a farm, it expressly authorizes

the inclusion of *force-fed* foie gras as an ingredient in its approved poultry products. In rejecting a petition from one of Respondent's animal rights amici, USDA publicly reminded that its FSIS has determined that "foie gras *made from the livers of force-fed poultry* is not an adulterated and diseased product and is not 'unsound, unhealthful, unwholesome, or otherwise unfit for human food' under the Poultry Products Inspection Act." (*See* https://perma.cc/S8L3-DR4K [Ltr. of 8/27/2009 from FSIS].)

4. The PPIA includes a preemption clause that provides that "*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." 21 U.S.C. 467e.

B. California's Poultry Liver Requirement.

1. In July 2012, a California ban took effect that provides: "A product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." Cal. Health & Safety Code § 25982. (In a separate statute, § 25981, California also banned the *practice* of force feeding within California. But Petitioners here are not challenging that provision, since all of Petitioners' USDA-approved poultry products are produced from ducks fed outside California.)

The bill's author contended that the process used in producing foie gras was "hard" on the ducks. Yet California's own Department of Food and Agriculture — the agency with actual oversight of foie gras production in the State — formally reported that

"Production of Foi[e] Gras in California does not involve cruelty at any time" and that "Foi[e] Gras production is a food production industry well established in conformity with humane animal management, safe food practices and environmentally protective provisions of State and Federal law." CA9.20-55882.Dkt.30 at SER-073.

2. While the California statute would appear on its face to apply to any product that "is the result of" force-feeding," the Ninth Circuit previously held in this case that the *only* products that are the subject of § 25982 are poultry liver products. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 947 n. 6 (9th Cir. 2013) (*Canards I*).

California has a different notion of foie gras — one that exists only in its imagination. The state insists that it does not ban foie gras. But § 25982 of its Health and Safety Code prohibits the sale of a poultry product if it is "the result of force feeding a bird," i.e., causing a duck "to consume more food than a typical bird of the same species would consume voluntarily."

A violation of § 25982 subjects the seller to a penalty of up to $1,000 per sale per day. Cal. Health & Safety Code § 25983(b).

C. Petitioners' Poultry Products.

1. Petitioners include the leading producer of foie gras products in the United States as well as the leading producers in Canada. Hudson Valley and the Canadian Farmers go to great lengths to ensure the welfare of their animals. They are governed by strict laws against animal cruelty in the jurisdictions where their ducks are raised. N.Y. Agric. & Markets

Law § 353; Criminal Code of Canada, R.S.C. 1985, c. C-46 § 445.1.

As two leading experts on foie gras production made clear in the record below — unrefuted by any evidence from Respondent — it is impossible to obtain foie gras from a "specially fed and fattened" duck if the duck has not been caused to consume "more food" than it (or a typical bird like it) would consume voluntarily. CA9.20-55882.Dkt.30 at SER-184-188; SER-173-176. Each of them agrees: "As a matter of basic waterfowl biology, it is impossible to obtain a fattened liver from a goose or duck without causing the bird to consume more food than it (or a typical duck like it, raised under the same conditions and provided the same diet) would consume voluntarily." *Id.* at SER-185-186, SER-174.

These experts' views are consistent with those of the American Veterinary Medical Association (AVMA). In its recent peer-reviewed summary of the scientific literature on the production of foie gras, the AVMA states point-blank: "Force feeding is *necessary* to produce the size and fat content that makes a liver 'foie gras'." CA9.20-55882.Dkt.30 at SER-175-176, 179 (emphasis added).

USDA itself has recognized, in a case which Respondent cited below, 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*." *See* Br. U.S., *Animal Legal Defense Fund v. USDA*, No. 2:12-cv-04028 (C.D. Cal.), Dkt.67, p. 7 n.7 (emphasis added).

Petitioners' poultry animals are slaughtered

under USDA inspection at official establishments. The livers removed from the animals' carcasses are then prepared under USDA-inspection at official establishments, where they are included as USDA-approved ingredients in poultry products that bear USDA's mark of wholesomeness — in fact, as noted above, as *required* ingredients in those products.

D. Proceedings Below.

1. On July 2, 2012, the first court day that § 25982 was in effect, Petitioners filed suit and promptly moved for a preliminary injunction based on their claims under the dormant Commerce Clause. The district court recognized that Petitioners would likely suffer irreparable harm but denied Petitioners' motion. *Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Harris*, 2012 WL 12842942 at *3 (C.D. Cal. 2012).

The Ninth Circuit affirmed. It observed that § 25982 is not a price-fixing statute and held that this Court's leading precedents on extraterritorial regulation are simply "not applicable to a statute that does not dictate the price of a product." *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris,* 729 F.3d 937, 950 (9th Cir. 2013) (*Canards I*). The Ninth Circuit emphasized that Plaintiffs had not yet "demonstrated that a nationally uniform production method is required to produce foie gras." *Id*. It explained that, "[i]f no uniform production method is required, Plaintiffs may force feed birds to produce foie gras [only] for non-California markets." *Id*. And it repeated that "the State has an interest in preventing animal cruelty in California," *id*. at 952 — without regard to the fact that all of Petitioners'

ducks are raised far beyond California's borders.

Petitioners' petitioned for a writ of certiorari, which garnered amicus support from 13 other States and from a major Canadian trade association. *See* No. 13-1313. The petition was relisted but ultimately denied.

2. On remand, Petitioners added a claim for express "ingredient" preemption under section 467e of the PPIA, and moved for summary judgment. They submitted multiple declarations explaining how every poultry product they produce that contains foie gras is prepared at an official establishment under USDA inspection. They submitted the federal materials that specify the definitions and standards of identity and composition of foie gras products. They even submitted examples of their USDA label approvals with the actual ingredients panels on their products. Respondent did not submit any evidence in opposition.

On January 7, 2015, the district court granted Petitioners' motion for summary judgment. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 79 F.Supp.3d 1136 (C.D. Cal. 2015). The district court stated the crux of the dispute as follows: "This issue boils down to one question: whether a sales ban on products containing a constituent that was produced in a particular manner is an 'ingredient requirement' under the PPIA." *Id*. at 1138. It followed this Court's teachings in *National Meat* in finding that "[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." *Id*. at 1144-1145.

The district court further explained the essence of preemption in this case: "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." *Id*. at 1145. The court permanently enjoined California from enforcing section 25982. *Id*. at 1148.

3. Respondent appealed. In a published opinion, the Ninth Circuit concluded that § 25982 does not impose an ingredient requirement on Petitioners' poultry products because, in that court's view, "Nothing 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." *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra,* 870 F.3d 1140, 1150 (9th Cir. 2017) (*Canards II*) (emphasis added). While this case concerns finished poultry products, the Ninth Circuit stated, "The fact that Congress established 'ingredient requirements' for poultry products that are produced does not preclude a state from banning products — here, for example, on the basis of animal cruelty — well before the birds are slaughtered." *Id*.

The Ninth Circuit denied rehearing en banc but, recognizing that Petitioners would present a "substantial question" to this Court, stayed issuance of its mandate. CA9.15-55192.Dkt.57. Petitioners petitioned for a writ of certiorari. Amici including the French government, the U.S. Poultry & Egg Association, and 11 other States filed five amicus briefs urging this Court's review. *See* No. 17-1285.

The Court called for the views of the Solicitor General of the United States. The United States explained that whether "foie gras can be produced in a manner that does not entail the force-feeding prohibited by Section 25982" was a "*critical premise*" that determined whether § 25982 imposes a pre-empted ingredient requirement. "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***." As the Solicitor General continued, citing this Court's decision in *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012), ***"a state law that prohibited the only extant methods for producing products containing certain ingredients may be preempted by the PPIA***." Br. U.S. in No. 17-1285.

In January 2019, this Court denied the petition in that appeal.

4. On return to the district court, Petitioners sought leave to amend their existing express preemption claim to include unmistakable allegations of the "critical premise" noted by the SG. For example, Petitioners' proposed Third Amended Complaint included new and unequivocal allegations that:

> [S]ection 25982 prohibits the sale of federally-approved poultry products in California that are the result of the only method ever known to man for producing the poultry ingredient foie gras. The fattened duck liver that constitutes foie gras cannot be produced by a method other than force-feeding as California defines it[.]

CA9.20-55882.Dkt.30 at SER-369.

In addition, while the panel in *Canards II* had declared that "Section 25982 does not require that foie gras be made with different … physical components," 870 F.3d at 1148, Petitioners added factual allegations to show that § 25982 *does* require that foie gras products be made from different physical components than federal law requires.

In spite of these new allegations establishing the important "factual predicate" for their express ingredient preemption claim, the district court denied Petitioners leave to amend it. App. 80. Instead of recognizing the significance of Petitioners' new factual allegations, the district court believed it was constrained by *Canards II*.

Petitioners then moved for summary judgment on their impossibility preemption claim, and California cross-moved to dismiss the case. App. 63. In support of their motion, Petitioners introduced declarations and documentary evidence from poultry scientists to conclusively establish the "essential factual premise" that the Solicitor General had stated would present this Court with a "more difficult question." California did not introduce any contrary evidence.

The district court denied Petitioners' summary judgment motion and granted Defendant's motion to dismiss the complaint. App. 63.

5. Petitioners appealed. In a published opinion discussed further below, two judges of the Ninth Circuit affirmed. A third dissented. The majority assumed (as Petitioners' unrebutted evidence showed) that it is physically impossible to produce

foie gras without force feeding and that California's sales ban functions to prohibit all foie gras sales in California. App. 9. But the majority then remarkably claimed that "the [federal] definition of foie gras is beside the point." App. 11. As they saw it, there is no impossibility of compliance with both state and federal law because Petitioners "just cannot sell those products in California." App. 11.

In so holding, the majority purported to distinguish *National Meat* on the ground that it dealt with the (nearly identical) express preemption provision regarding "operations" in the federal meat inspection statute. The majority ignored the reality that, like the sales ban in *National Meat*, § 25982's sales ban functions as a command to poultry product producers to omit from their foie gras products an essential ingredient that is the subject of the (nearly identical) express preemption provision regarding "ingredients" in the PPIA and that the federal government requires as a principal ingredient in each of those products.

The majority also purported to distinguish *Bartlett* on the ground that the state law in that case "imposed a duty on manufacturers *not* to comply with federal law." App. 13 (emphasis in original). It ignored how § 25982 requires Petitioners to either modify their products to remove the primary poultry ingredient that federal law requires them to include or face prosecution under California law. *Id.* And the majority made no mention of the PPIA's prohibition on omitting any valuable constituent from a poultry product. 21 U.S.C. § 453(g)(8); 9 C.F.R. § 381.1(b)(viii). The majority recognized that, "[i]f, for example, federal law required foie gras to be

from force-fed birds but California law required foie gras *not* to be from force-fed birds, producers could not comply with both state and federal law." App. 13-14. But it refused to see how § 25982 operates in exactly that way and went on to hold that, even if federal law requires foie gras to be the liver of force-fed birds, § 25892 escapes preemption because "California says only that it may not be sold in the state." App. 14.

As for this Court's rejection, in *Bartlett*, of this very same "stop-selling" rationale, the majority held that "[c]onfining *Bartlett*" to "the products liability context" "makes sense." App. 14.

On the issue of express preemption of § 25982 as an "ingredient requirement" for poultry products made with foie gras, the majority declared itself bound by the opinion in *Canards II*. After acknowledging that Petitioners had now established for the record that "force feeding is required to produce foie gras," i.e., "the impossibility of non-force-fed foie gras," the majority said these facts "are immaterial" because a prior panel in *Canards II* had held that, "if a state bans a poultry product like foie gras, there is nothing for the PPIA to regulate." App. 16. The majority observed that "that precedent must be followed unless overruled by a body competent to do so." App. 17.

The two-judge majority also held that § 25982 does not violate the dormant Commerce Clause's extraterritoriality doctrine or *Pike* balancing. App. 20. The majority followed Ninth Circuit precedent — including the court of appeals' decision under review before this Court in *NPPC*, No. 21-468 — in suggesting that § 25982 is not impermissibly extra-

territorial because it does no more than "influence" out-of-state producers' conduct. App. 20.

On Petitioners' claim under *Pike*, the majority cited to the district court's erroneous footnote reference to an interest in "public health," in spite of the fact that — as Petitioners had taken pains to point out — there is nothing in the statute, zero record evidence, and not even an argument from California that § 25982 serves any "public health" interest. App. 21; CA9.20-55944.Dkt.71 at 21-22. Without any analysis of the scope of § 25982's effect on the interstate market for foie gras products, the majority "rejected the notion that sales bans are inherently burdensome."

6. In a 17-page dissent, Judge VanDyke readily recognized that § 25982 is preempted both under the doctrine of impossibility preemption as well as by virtue of the PPIA's express preemption of state laws that impose "ingredient requirements" on poultry products, such as § 25982 functions to do in this case. App. 29-47.

The dissent explained how the majority's reasoning "has already been rejected by the Supreme Court [i]n *National Meat*." App. 35. And it pointed out the "head-on collision with *Bartlett*," as well as the "flawed analysis" in *Canards II*. App. 38, 31.

> California has prohibited the sale of any bird liver if that bird was force-fed, and the only way to make foie gras that complies with federal requirements is through force-feeding. This forces Plaintiffs into an impossible situation, and one in which the only solution is

> to stop selling any foie gras in California. Although the majority deems this solution sufficient, the Supreme Court has held [in *Bartlett*] that market participants cannot be forced to "stop selling" when it is impossible to comply with conflicting state and federal requirements, and the majority's attempt to free itself from this clear command is unavailing.

App. 30.

> In short, the federal government has defined foie gras to mean specially fed and fattened (i.e., force-fed) goose and duck liver, while California has banned the sale of any foie gras produced by force-feeding the bird. This means there is no universe in which Plaintiffs can comply with both the PPIA and § 25982, because there is no universe in which Plaintiffs could follow California's requirement for acceptable foie gras while also meeting the federal definition of what foie gras is.

App. 34.

The dissent followed this Court's precedential guidance in *National Meat* and *Bartlett*, provided a thorough treatment of the two key preemption questions at the heart of this case, and should be read in its entirety.

The court of appeals denied rehearing and rehearing en banc. App. 87. This timely petition followed.

REASONS FOR GRANTING THE PETITION

Certiorari is necessary to bring California — and the Ninth Circuit — into line with this Court's precedents and to delineate how far state legislatures (and lower courts) may go in seeking to control production methods used by out-of-state producers.

I. The Ninth Circuit's Jurisprudence "Makes a Mockery" of Preemption Principles and Collides "Head-On" with This Court's Teachings in *National Meat* and *Bartlett.*

"We will find preemption where it is impossible for a private party to comply with both state and federal law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). "A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

Yet the majority's opinion here, in upholding § 25982's ban on the sale of wholesome poultry products that include foie gras, allows California to get away with exactly what this Court has repeatedly held that a State cannot do. Petitioners' allegations — and their evidence in support of summary judgment — established that it is *physically impossible* to comply with USDA's uniform federal definition for foie gras products sold in America — i.e., that they be made from the liver "obtained exclusively from specially fed and fattened" ducks — if Petitioners must also comply with California's requirement that such products sold in the State *not*

be the result of "force feeding." 2-SER-185-187; 2-SER-173-175; 2-SER-264, 319. Cal. Health & Safety Code § 25980(b); *see Nat'l Broiler Council v. Voss*, 44 F.3d 740, 743-745 (9th Cir. 1994) ("the term 'requirements' in the PPIA pre-emption clause unambiguously includes prohibitory enactments").

The majority starts from the premise that USDA's very definition of foie gras "is ***beside the point***." (App. 11 (emphasis added).) But the federal framework that prescribes the definitions of poultry products was not created merely as some kind of Good Housekeeping seal of approval. The PPIA itself authorizes the Secretary of Agriculture to "prescribe … definitions and standards of identity or composition [f]or articles subject to" the PPIA. 21 U.S.C. § 457(b). And USDA regulations authorize the agency's establishment of "specifications or definitions and standards of identity or composition, covering the principal constituents of any poultry product with respect to which a specified name of the product or other labeling terminology may be used[.]" 9 C.F.R. § 381.155(a)(1).

The majority tells us that, even assuming that USDA requires foie gras to result from the very force feeding that California prohibits, "the sellers can still force feed birds to make their products. *They just cannot sell those products in California*." (*Id.* (emphasis added).) The majority goes on to say:

> If, for example, federal law required foie gras to be from force-fed birds but California law required foie gras *not* to be from force-fed birds, producers could not comply with both state and federal law. There is no such impossibility here. Even if federal law requires

> foie gras to be the liver of force-fed birds, *California says only that it may not be sold in the state*.

App. 14. But this not only misapprehends Petitioners' claim; it is contrary to this Court's preemption jurisprudence in *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013). *See* App. 37.

In the first place, the majority's belief that "[t]here is no such impossibility here" is belied by Respondent's own *concession* at oral argument that, if § 25982 effectively bans the sale of foie gras produced in the manner required under federal law (as it does), then it must yield under the doctrine of conflict preemption. Asked whether there would be a preemption problem if the California law banned the sale of foie gras "if it was from specially fed and fattened ducks," Respondent answered, "*There would*. If there is a specific — *that's a direct conflict*." *See* https://www.ca9.uscourts.gov/media/video/?20211018/20-55882/ at 22:08–22:34. "A party … is bound by concessions made in its brief or at oral argument." *Hilao v. Estate of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004).

Petitioners' claim — and the majority's error — can be easily distilled as follows: The federal government inspects each of Petitioners' poultry products and passes them for "sale in commerce, as articles intended for human food." 9 C.F.R. § 381.6(a). The primary ingredient in Petitioners' products, i.e., foie gras, must be the result of a "special" process for feeding and fattening ducks. At the same time, California claims it allows the sale of Petitioners' foie gras products but only if they are *not* the result of that very feeding process. Cal. Health &

Safety Code § 25982.

It is therefore physically impossible, as Petitioners' allegations and uncontradicted evidence established, for Plaintiffs to comply with both the federal requirements and California law in producing their poultry products for sale in California — *unless* Plaintiffs heed the majority's "solution" that they can avoid this impossibility if they simply "stop selling" these products in California.

Unfortunately, the majority's "stop-selling rationale" is exactly what this Court in *Bartlett* rejected as "*incoheren[t].*" 570 U.S. at 486-87 (emphasis added). "[O]ur preemption cases presume that a manufacturer's ability to stop selling does not turn impossibility into possibility." *Id*. at 487.

> We *reject this "stop-selling" rationale as incompatible with our pre-emption jurisprudence*. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations *is not required to cease acting* altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be "all but meaningless."
>
> The *incoherence of the stop-selling theory* becomes plain when viewed through the lens of our previous cases. In every instance in which the Court has found impossibility pre-emption, the "direct conflict" between federal- and state-law duties could easily have been avoided *if the regulated actor had simply ceased acting*.

Id. (emphasis added), citing *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 620-21 (2011) (rejecting argument that

preemption required proof that federal agency would not have allowed compliance).

The majority downplayed *Bartlett* to the point of delegitimizing it. It first claimed that "*Bartlett* has never been read so broadly" as Petitioners and the dissent contend. (App. 14.) For this, the majority cited three cases — the first of which, *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1146 (9th Cir. 2015), never even mentions *Bartlett* and the other two of which (the "horsemeat" cases from other circuits) were decided years *before* this Court issued *Bartlett* — and thus obviously could not have read it all, let alone broadly or narrowly.

The majority also claimed that the doctrine of impossibility preemption is and should be "confin[ed]" to the "products liability context." Yet the case most often cited for the impossibility preemption doctrine itself is one involving the marketability of avocados. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963) (finding record evidence presented no impossibility where Florida sellers could still sell avocados in California even when tested under dissimilar maturity standards). In any event, it is only this Court that could limit its jurisprudence from just nine years ago in *Bartlett*.

In that vein, the majority's reasoning strays from this Court's broader teachings on preemption. As the Court has recently explained, all forms of preemption "work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the

state law is preempted." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018). In other words, given the uncontradicted evidence of impossibility — and Respondent's admission that "USDA has ***approved for sale*** Plaintiffs' foie gras products produced from birds that were force fed," CA9.20-55982.Dkt.30 at SER-126, lns. 14-17 (emphasis added) — this Court should not allow the Ninth Circuit and California to tell Plaintiffs to just "stop selling" their foie gras products in the state.

This Court made clear in *National Meat* that a court evaluating preemption should consider how a sales ban instead "functions as a command" to federally-regulated official establishments to accomplish indirectly what a State may not do directly. 565 U.S. at 454. Yet the majority opinion below never even mentions this approach either, which led it to a result that defies not only this Court's instruction but also basic logic. Just as the California sales ban in *National Meat* improperly functioned to prohibit USDA-approved meat products made with pork from non-ambulatory pigs (which are approved for slaughter by USDA), so too does the California sales ban here improperly function to prohibit USDA-approved poultry products made with livers from force-fed ducks (which are approved as ingredients by USDA).

National Meat concerned a perhaps well-intentioned but constitutionally misguided California law that, like here, sought to regulate the sale of a USDA-approved meat or poultry product based on the way the animal was treated prior to slaughter. Like the Ninth Circuit says about force-fed ducks in this case, the court of appeals in *National Meat*

accepted California's argument that it was merely removing some "***types***" of pigs (the nonambulatory ones) from the federally-regulated meat production process. Indeed, relying on the same inapposite cases involving horsemeat that the court of appeals did at its peril in *National Meat*, the Ninth Circuit here says: "*Nothing* 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. 16 (first emphasis added).

But this Court has already soundly rejected this notion. "According to the Court of Appeals, 'states are free to decide which animals may be turned into meat.' *We think not*." *National Meat*, 565 U.S. at 465 (citation omitted; emphasis added). This Court went on to strike the ban on sale of meat made from nonambulatory pigs, noting how such a law undermined the preemptive force of the identical language found in the PPIA. "[I]f the sales ban were to avoid the FMIA's preemption clause, then any State could impose any regulation on slaughter-houses" — or, here, USDA-regulated producers of poultry products — "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 FMIA's preemption provision." *Id*. at 464 (emphasis added).

As this Court has emphasized, "Pre-emption is not a matter of semantics. A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636 (2013). Nor may a court of appeals. This is

especially so where the Ninth Circuit here held that, the PPIA be damned, a State can dictate what types of poultry animal may be used as an ingredient "even if [the statute] results in the *total ban*" of that poultry product. App. 16. (emphasis added).

Unfortunately, the Ninth Circuit's opinion simply flouts this Court's crucial teachings and now enables States to make a mockery of the PPIA. And it undermines Congress's interest in the uniform, national market for USDA-approved poultry products that other circuits have upheld. Just as it was incumbent on this Court to hold in *National Meat* that a State may not even impose any non-conflicting requirements on *meat* products from animals slaughtered at a USDA-inspected slaughterhouse, this Court should take up this case to hold that a State may not impose any additional or different ingredient requirements on *poultry* products prepared in accordance with USDA's ingredient requirements.

Over 100 years ago, in *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898) — a case that pre-dates the PPIA but remains binding to this day — this Court invalidated a state ban on the sale of another federally-approved product that was controversial at the time: oleomargarine. "If [C]ongress has affirmatively pronounced the article to be a proper subject of commerce, we should rightly be influenced by that declaration." *Id*. at 8. Congress had provided for federal inspection of oleomargarine, *id*. at 8-9, just as it has done for foie gras products through the PPIA here. This Court held, "[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, and which in its pure state is healthful." *Id*. at 14.

II. The Ninth Circuit's Majority Opinion Conflicts with Precedents from Multiple Other Circuits on Both the Preemption and Dormant Commerce Clause Questions.

The majority opinion below deviates from the decisions of other circuit courts both with respect to the preemption issues under the PPIA as well as the question of extraterritorial regulation under the dormant Commerce Clause.

The majority's holding about the purpose and scope of the PPIA's ingredient preemption is at odds with longstanding decisions from the Fifth and Sixth Circuits. Those circuits have not hesitated to recognize what this Court has recently reaffirmed. The PPIA not only "sweeps widely" but also "prevents a State from imposing any additional or different — ***even if non-conflicting*** — requirements." *National Meat*, 565 U.S. at 459 (emphasis added) (analyzing materially identical section in Federal Meat Inspection Act).

In *Armour & Co. v. Ball*, 468 F.2d 76, 86 (6th Cir. 1972), the Sixth Circuit took up a Michigan ban on sausage that included an animal's "liver cracklings" (among many other unusual parts). The Sixth Circuit cited the identical FMIA provisions as those in the PPIA and observed that one purpose of requiring preemptive adherence to USDA's standards was that, "[w]ithout such standards it would be impossible to carry out the express congressional policy." *Id*. at 81. "The Federal Act itself *manifests a congressional intent to prescribe uniform standards* of

identity and composition," and "*the congressional purpose* to standardize identity and composition of meat food products *would be defeated if states were free to require ingredients*, however wholesome, which are not within the Secretary's standards." *Id.* (emphasis added).

In direct contrast to the court of appeals here, the Sixth Circuit in *Armour & Co.* could not have been more emphatic about the preemptive effect of the very language in the FMIA's preemption clause that appears verbatim in the PPIA:

> Thus, by prohibiting a state's imposition of … ["]ingredient requirements" which are "in addition to, or different than [those made by the Secretary]," Congress has "unmistakably … ordained" that *the Federal Act fixes the sole standards*.
>
> [A] state would not be permitted to prevent the distribution in commerce of any article that "conforms" to the "definition and standard of identity or composition." Thus, *Congress is ordaining uniform national ingredient requirements* prescribed by the Secretary.

Armour & Co., 468 F.2d at 84 (emphasis added).

In addition, the Ninth Circuit's opinion runs counter to the Fifth Circuit's en banc opinion in *Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293 (5th Cir. 1994). While the court of appeals here again completely ignored Congress's objective of national uniformity for poultry products, the Fifth Circuit made clear that, through the PPIA, "Congress thus subjected all domestic poultry production sold in

interstate commerce to a single, federal program with uniform standards." *Id.* at 295-96 (emphasis removed). As the Fifth Circuit explained, "*The PPIA created one uniform regulatory scheme for the national market*," and "the PPIA maintain[s] uniformity regarding the interstate sale of domestic poultry products." *Id.* at 296 (emphasis added).

The Ninth Circuit's opinion here cannot be reconciled with these other circuit precedents. If it is left to stand, then any State could impose its own requirements on the sale of any USDA-approved meat or poultry product based on the provenance of its principal ingredient, and the resulting patchwork would destroy the very national uniformity that Congress sought to achieve in the PPIA.

On the dormant Commerce Clause issue of extraterritorial regulation, the Ninth Circuit's opinion departs from multiple other circuits (and from this Court's precedents). *See, e.g., Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 45-46, 69-70 (1st Cir. 1999), *aff'd on other grounds sub no. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (limitation on Burma-related business violated extraterritoriality doctrine since its "intention and effect" were to change conduct beyond Massachusetts's borders"); *C & A. Carbone, Inc. v. Town of Clarkstown, N.Y*, 511 U.S. 383, 393 (1994) ("States and localities may not attach restrictions to exports or imports in order to control commerce in other States."). This circuit split was amply described in the petition-stage briefing in *NPPC*, e.g., Br. of Indiana and Other States, No. 21-468 (Nov. 10, 2021), and the Court presently has that case under submission on the merits.

Because the dormant Commerce Clause issues this case presents are highly similar to those in *NPPC*, Petitioners believe that — in the event that the Court does not grant this petition outright — it should be held pending the Court's opinion in *NPPC* and considered on both the preemption and dormant Commerce Clause issues at that time if the result in *NPPC* does not compel reversal here.

III. The United States Recognizes the Broad Significance of the Questions in This Case to USDA's Regulation of the Nation's Meat and Poultry Supply.

This case is as much about foie gras as it is about frankfurters or fresh chicken breast. Indeed, this case is essentially about a State's power to ban *any* USDA-approved meat or poultry product if its ingredients come from animals that were raised in a way the State may disfavor. Whether it is the finest pâté or the wings from any of the nine billion chickens processed under USDA inspection each year, the Ninth Circuit's precedential ruling raises issues of national importance.

The United States has recognized the significance of both the preemption and dormant Commerce Clause questions this case presents. When Petitioners were last before this Court on a petition for certiorari focused on their express preemption claim, the Court called for the views of the Solicitor General. In its response, the United States explained that "an essential factual premise" of Petitioners' claim — that § 25982 "operates to forbid the sale of all foie gras" — had not been established because, as the *Canards II* panel believed, "nothing in the record

before us shows that force-feeding is *required* to produce foie gras." *See* Br. U.S., No. 17-1285 (U.S. Dec. 4, 2018) (emphasis added).

The United States explained that whether "foie gras can be produced in a manner that does not entail the force-feeding prohibited by Section 25982" was a "critical premise" that determined whether § 25982 imposes a preempted ingredient requirement "in addition to, or different than," those made under the PPIA. *Id.* (emphasis added). "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" (than what the *Canards II* panel answered). *Id.* As the SG continued, citing this Court's decision in *National Meat*, "a state law that prohibited ***the only extant methods*** for producing products containing certain ingredients may be preempted by the PPIA." 565 U.S. at 464 (emphasis added).

The SG concluded there was no occasion at that time "to resolve the difficult question whether a statute like Section 25982 ***would be preempted if, as applied, it operated to ban a particular substance in a poultry product***. For as explained above, petitioners have not established t*he factual predicate* for such a claim because they have not established that liver for foie gras cannot be produced by a method other than force-feeding the geese or ducks.

Now that this essential premise has been conclusively established by Plaintiffs' unrebutted record evidence on summary judgment, the Court should take up the challenging questions presented by this case.

Similarly, while Petitioners initially sought review some eight years ago of the same dormant Commerce Clause issues that now permeate multiple cases originating in the Ninth Circuit, including *NPPC*, No. 21-468, the United States now recognizes what Petitioners have maintained, at least as to *farm* animals: that "California 'has no legitimate interest in protecting' the welfare of animals located outside the State." Br. U.S. at 10 in, No. 21-468 (U.S. Jun. 17, 2022)

IV. This Case Presents an Ideal Vehicle to Provide Needed Clarity to the Lower Courts on These Vital Questions.

This petition follows a full decade of litigation in the lower courts, including a record of uncontradicted evidence and three published court of appeals decisions. Not since almost 60 years ago, in *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), have the related preemption and dormant Commerce Clause questions come before this Court together in a case involving food. Given the increasing volume of state legislation targeting products of animal agriculture, this petition — involving one of the most coveted and controversial foods of all time — could not be more timely.

On the preemption issues, the case is now teed up for this Court's merits review in exactly the way the Solicitor General specified following the Court's call for his views in Petitioners' prior appeal in 2018. Petitioners have established the "critical premise" that California bans the sale of poultry products based on the *only* way their primary ingredient can be produced. And, unlike cases taken up at the

preliminary injunction or pleading stages, this case has a full evidentiary record on the relevant issues, established through two summary judgment motions.

On the dormant Commerce Clause issues, this case offers just as strong a basis for review (if not stronger) as *NPPC*, which the Court granted last term for hearing in this one. While California initially advanced a "health-and-safety" concern to support its restriction of sales of whole pork derived from sows not raised in accordance with its dictates, California has never suggested any such "legitimate local interest" in ours. While California is still home to a small percentage of hogs, in our case § 25982 does not apply to a single duck or goose in California. And while the statute in *NPPC* still allows for pork to be sold in California (if from a hog raised in the way California demands), § 25982 operates as a total ban on Petitioners' wholesome poultry products.

There is no reason for this Court to wait any longer to see what California or any other State may serve up next in an effort to foist its preferences on producers of food products in other States. When Petitioners first sought review in this Court in 2014, they explained: "Petitioners' ducks are the proverbial canaries in the coal mine. If the Ninth Circuit's opinion is not reversed by this Court, it will serve as a license for California to wall off its market of 38 million consumers to even the most wholesome, delicious, or life-saving commerce from outside the State whenever the California Legislature decides it disapproves of the way something is produced." *See* No. 13-1313 (Apr. 28, 2014). And that will only continue unless the Court confronts the questions presented in this petition without further delay.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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