No. 22-472

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

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

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's reinterpretation of preemption doctrine allows states to enforce food production regulations that directly contradict federal law and introduce variability into Congress' uniform regulatory scheme. Integral to the Association's—and, by extension, the Nation's—economic health is the uniform regulatory regime designed by Congress in the Poultry Products Inspection Act, 21 U.S.C. § 451 et seq.

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties were timely notified pursuant to Rule 37.2(a) of *amicus curiae*'s intent to file this brief, and all parties have provided written consent to its filing.

("PPIA"), and implemented by the U.S. Department of Agriculture. The opinion of the Ninth Circuit licenses state and local governments to displace the federal scheme with a patchwork of disparate standards governing the sale of poultry products. This holding—reached over the objections of a well-reasoned dissent—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.

California Health & Safety Code § 25982 runs directly contrary to federal statute and is therefore null and void. Congress has clearly established that no state or locality may impose "[m]arking, labeling, packaging, or ingredient requirements … in addition to, or different than" those prescribed by the USDA. *See* 21 U.S.C. § 467e. And for some five decades, the poultry and egg industry has operated with the understanding that the PPIA "manifests a congressional intent to prescribe uniform standards of identity and composition." *Armour & Co. v. Ball*, 468 F.2d 76, 83 (6th Cir. 1972). Section 25982, which prohibits the sale of poultry liver products that USDA has declared saleable "if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size," is therefore preempted by federal law. Enactments such as § 25982 disrupt Congress' uniform regulatory framework and effectively interdict the federally supervised flow of poultry products across state lines.

Even if the PPIA's preemption clause did not expressly invalidate § 25982, the statute must give way because it is impossible for foie gras sellers to comply with both state and federal law. As Judge Vandyke's

dissent below noted, "the PPIA and § 25982 require foie gras to be produced through mutually exclusive and irreconcilable methods." *Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Bonta*, 33 F.4th 1107, 1127 (9th Cir. 2022). The Ninth Circuit's opinion salvaged this obvious conflict by concluding that foie gras sellers should simply cease selling their products in California. This Court has rejected that rationale in previous impossibility preemption cases and permitting its adoption here would all but destroy the doctrine.

The Ninth Circuit's conclusion that states and localities have carte blanche authority to "regulate the types of poultry that may be sold for human consumption," *id.* at 1117, furnishes an easy roadmap for vitiating the PPIA. If, as the Ninth Circuit maintains, states can evade Congress' undisputed exclusive authority to impose "ingredient requirements" simply by styling their own mandates as "prohibitions" on "types of poultry," the federal regulatory framework will be gutted by a hodgepodge of state laws. This will occlude critical channels of interstate commerce, engender legal uncertainty, and increase costs to consumers—precisely the outcomes Congress sought to avoid, *see* 21 U.S.C. § 451. As it did in *National Meat Association v. Harris*, 565 U.S. 452 (2012), this Court should enforce the clear intent of Congress as expressed in the language of 21 U.S.C. § 467e.

This case also presents serious questions under the Dormant Commerce Clause regarding California's ability to enact extraterritorial legislation. No ducks or geese are force-fed in California, meaning Section § 25982 regulates conduct occurring entirely outside the state and produces supposed benefits accruing

entirely outside the state. This Court has recently taken up a nearly identical problem in *National Pork Producers Council v. Ross*, No. 21-468 (argued Oct. 11, 2022). To the extent the resolution of those overlapping issues may control the outcome of this case, the petition should be held for a result in *National Pork Producers*.

ARGUMENT

I. THE PPIA PREEMPTS ANY STATE LAW THAT REGULATES THE TYPES OF POULTRY SOLD FOR HUMAN CONSUMPTION

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

mandates, § 25982 falls squarely within this preemptive ambit.

A. The PPIA expressly preempts California's law by carefully regulating the ingredient requirements for poultry products.

The PPIA, through 21 U.S.C. § 467e, expressly preempts California Health & Safety Code § 25982. The Petition for Writ of Certiorari amply demonstrates this express preemption. *Amicus* will highlight, however, how precedent has engendered a settled expectation in the poultry and egg industry that the USDA is exclusively empowered to determine whether and under what circumstances a poultry product may be sold for human consumption.

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

Armour is a crucial precedent for the poultry industry because it cemented the uniformity of

Congress' regulatory scheme. Although that case involved the FMIA, that statute's preemption clause is substantively identical to that in the PPIA; the Sixth Circuit noted that the two enactments share the same "precise preemptive language." *Id.* The two statutory schemes have long been closely connected. Congress has stated a desire that the PPIA would establish a regulatory structure for poultry products coextensive with that governing meat products, *see generally* 103 Cong. Rec. – Senate 1644, Feb. 7, 1957 (Statement of Sen. Humphrey) (indicating that PPIA contemplated a "poultry program that would give Americans the same protection as meat inspection has provided during the last half century"). Thus, *Armour* established a regulatory equilibrium that fixed authority to prescribe the permissible content of poultry products solely in the USDA.

Subsequent pronouncements of this Court and the Circuit Courts of Appeal have reinforced the PPIA's robust preemptive scope. *See, e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 530–31 (1977) (finding that FMIA's "explicit pre-emption provision dictates" invalidation of state laws concerning determination of product's net weight for labeling purposes); *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, 1002–03 (2d Cir. 1985), *aff'd sub nom. Gerace v. Grocery Mfrs. of Am., Inc.*, 474 U.S. 801 (1985) (holding that New York's labeling requirements governing meat and poultry products containing imitation cheeses "do not comport exactly with the federal specifications" and were thus preempted by the FMIA and the "essentially identical" preemption clause in the PPIA); *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 747 (9th Cir. 1994) (concluding that PPIA preempted California law that prohibited certain

poultry products from being labeled "fresh," even though they satisfied federal criteria for "fresh" labeling).

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

National Meat is important because it encapsulates and entrenches a key legal and economic premise of the poultry and egg industry: if a poultry product complies with the USDA's panoply of rigorous quality and safety directives, no state or locality can prohibit or otherwise impede its sale. Because the Ninth Circuit's opinion is irreconcilable with this precept and with the express preemptive language of 21 U.S.C. § 467e, this Court's intervention is necessary.

B. California's law is preempted because it is impossible to comply with both the federal PPIA regulation and California's dictate.

A foie gras seller who wishes to avail itself of the California market is subject to two legal obligations:

> 1) its foie gras must be made from the livers of force-fed geese and ducks; and

> 2) its foie gras may not be made from the livers of force-fed geese and ducks.

Compliance with both of these obligations is impossible. The Ninth Circuit reasoned that this direct contradiction in state and federal law is not grounds for preemption of § 25982 because sellers could simply "withdraw from the market." *Ass'n des Éleveurs*, 33 F.4th at 1115. This holding eviscerates the doctrine of impossibility preemption by confining it to cases where federal law compels a party to sell a product or service within a state. This is inconsistent with well-established Supreme Court precedent and would allow states to effectively nullify federal laws.

i. Well-established Supreme Court precedent rejects the stop-selling rationale.

Decades of Supreme Court precedent hold that impossibility preemption cannot be avoided by requiring a regulated party to cease acting. In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), one of the first cases to fully articulate the impossibility preemption doctrine, this Court addressed a hypothetical that is precisely on point. In that case, California forbade the sale of avocados containing less than eight percent oil by weight. The petitioners alleged that the law was preempted by a marketing order promulgated by the Secretary of Agriculture, which "gauge[d] the maturity of avocados grown in Florida by standards which attribute no significance to oil content." 373 U.S. at 134. This Court held that there was no impossibility preemption because the record "demonstrate[d] no inevitable collision between the two schemes of regulation." *Id.* at 143.

However, the Court specifically noted that impossibility preemption would apply if "for example, the federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content." *Id.* That is precisely this case. Federal law forbids the selling of foie gras that is not made from the liver of force-fed birds, but California law excludes from the state any foie gras made from the liver of force-fed birds.

Moreover, in this Court's prior impossibility preemption cases, the conflict between federal and state law could have been avoided if the regulated party had simply ceased their conduct in the state. Mutual Pharmaceutical could have pulled sulindac from shelves in New Hampshire, *see Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013), and generic drug manufacturers could have declined to sell metoclopramide in Minnesota or Louisiana, *see PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011). In fact, in *Mutual Pharmaceutical Co.*, the Court explicitly rejected the argument that any impossibility could be avoided if the petitioners ceased to sell their product, writing, "if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be 'all but meaningless.' " *See* 570 U.S. at 487–89 (quoting *PLIVA*, 564 U.S. at 621).

ii. The Ninth Circuit's reasoning would hollow out impossibility preemption.

This Court has refused to recognize the "stop-selling" rationale for good reason; its adoption would render impossibility preemption a husk. That much is demonstrated by § 25982 itself, which operates as a ban on foie gras solely because it contradicts federal law. Throughout its opinion, the Ninth Circuit refers to § 25982 as a "sales ban" on foie gras. The opinion reasons, "[e]ven assuming the USDA guidance requires force feeding, the sellers can still force feed birds to make their products. They just cannot sell those products in California." *Ass'n des Éleveurs*, 33 F.4th at 1114. But bald use of the term "sales ban" to describe § 25982 glosses over the most important logical step in the entire case. Because § 25982 is not nominally a ban on the sale of foie gras; it is a ban on sales of products resulting from the force feeding of birds to enlarge their liver. It operates as a ban on foie gras—and therefore on Petitioner and Amicus's products—only because federal law defines foie gras as the product of force feeding a bird to enlarge its liver. In other words, § 25982 is a "sales ban" exclusively because it is impossible to comply with both California and federal law in the sale of foie gras. *See Ass'n des Éleveurs*, 33 F.4th at 1125 ("there is no universe in which Plaintiffs can comply with both the PPIA and § 25982.") (Vandyke, J., dissenting). The majority opinion below posits that the solution to this dilemma is simple: foie gras sellers should stop selling in California. Essentially, the sellers should alter their conduct so that California's law does not apply to them. This, they cannot do without defying the uniform federal market regulation.

This argument eviscerates impossibility preemption and would have disastrous consequences for the uniformity of federal law. Functionally, the Ninth Circuit's argument means that impossibility preemption can only apply where federal law compels a party to sell a good or service in a particular state in contravention of that state's law. If (as here) neither state nor federal law compels the regulated conduct, the party could simply forgo the conduct, avoiding preemption. And if state law compels action in contravention of federal law (as in *Mutual Pharmaceutical Co.* and *PLIVA*) the regulated party can simply withdraw from the state. Only where a federal law obligates a party to act within a state in contravention of that state's laws would impossibility preemption come into play. This understanding of the doctrine would limit its applicability to a vanishingly small number of cases and would render essentially all of this Court's impossibility preemption precedent wrongly decided. *See Ass'n des Éleveurs*, 33 F.4th at 1126 (Vandyke, J., dissenting). "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." *Mut. Pharm. Co.*, 570 U.S. at 488.

The Ninth Circuit's understanding would also allow states to effectively nullify federal law. If California can pass a law rendering the sale of foie gras impossible because of a conflict with federal law, so can any other state. So can every other state. All fifty states could ban the sale of poultry products resulting from force feeding geese, each claiming that compliance was not impossible because foie gras sellers could simply take their product elsewhere. This

would effectively nullify federal law by rendering unsaleable foie gras produced in compliance with federal law.

Instead of unifying, the states could also balkanize. While the definition of foie gras in the USDA Policy Book has a single component, that will certainly not be true in future cases. Each state could choose to base its sales ban on a different portion of the production process. Despite the existence of a single federal definition of saleable foie gras, the producers would have to contend with fifty—each mutually exclusive with the federal definition in its own way. This is, of course, precisely the sort of situation preemption doctrine exists to prevent. *See, e.g.*, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

C. The PPIA occupies the field of regulating what types of poultry products may be sold.

Even if § 25982 were to somehow elude the literal terms of the PPIA's express preemption clause, Congress' and the USDA's extensive and exhaustive oversight of the production of poultry products occupies this regulatory field to the exclusion of any state or local laws governing the subject. This Court has long recognized that a "scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" and thus impliedly preempts state or local enactments. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Arizona v. United States*, 567 U.S. 387, 401 (2012) ("Field preemption reflects a congressional decision to foreclose any state

regulation in the area, even if it is parallel to federal standards.").

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

The PPIA purports to broadly "regulate the processing and distribution of" poultry and poultry products, 21 U.S.C. § 452, terms that are defined broadly to encompass "any domesticated bird, whether live or dead," and "any poultry carcass, or part thereof; or any product which is made wholly or in part from any poultry carcass or part thereof …." *Id.* § 453(e), (f). The statute secures exclusive federal control over "the distribution and sale of poultry and poultry products," *Voss*, 44 F.3d at 743, that are "found to be not adulterated," within the meaning of federal law. 21 U.S.C. § 457(a). The substantial breadth of the statutory directives is supplemented by a grant of authority to the Secretary of Agriculture to "promulgate such other rules and regulations as are necessary to carry out the provisions of" the PPIA. *Id.* § 463(b).

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

Further underscoring the USDA's authority "to prescribe definitions and standards of identity or composition for poultry products whenever he determines such action is otherwise necessary for the protection of the public," *id.* § 381.155(a)(1), the agency has developed a nearly 200-page compendium that sets specific federal standards for meat and poultry products, including foie gras. *See* UNITED STATES DEPARTMENT OF AGRICULTURE, FOOD STANDARDS AND LABELING POLICY BOOK (2005) (hereafter, "USDA Policy Book").

By prohibiting the sale of a poultry "ingredient" (i.e., fattened duck liver or foie gras) that conforms

precisely to the USDA's guidance, California has inserted itself directly into the federal regulatory landscape.

The ability of states to regulate certain facets of a broad subject matter is not mutually exclusive of field preemption of a defined subset of the subject matter. *See Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 296 (5th Cir. 1994) (acknowledging provisions for federal and state coordination concerning inspection programs, but observing that "[t]he PPIA created one uniform regulatory scheme for the national market"); *see also Arizona*, 567 U.S. at 411–15 (holding that Congress' preemption of field of alien registration did not necessarily displace state law that required state officers to a make a " 'reasonable attempt … to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States'"); *Rice*, 331 U.S. at 236–37 (finding that while federal Warehouse Act preempted certain fields, e.g., rate-setting and maintenance of grain elevators, it did not necessarily preclude state laws relating to, e.g., certain contracts and leases by warehouse operators). In short, the USDA's comprehensive regulatory framework demonstrates Congress' intent to occupy the field of regulating poultry ingredients—to include the processes and manner through which such ingredients are prepared or derived.[2]

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[2] Even if the PPIA's broad scope falls short of field preemption, "a state law is preempted where it 'stands as an obstacle to the *(cont'd)*

II. CALIFORNIA'S ATTEMPT TO REGULATE FOIE GRAS VIOLATES THE DORMANT COMMERCE CLAUSE

This case also presents Dormant Commerce Clause questions substantially identical to those presented by a case recently argued before the Court, *National Pork Producers Council v. Ross*, No. 21-468 (argued Oct. 11, 2022). That case concerns whether California's rules regarding the sale of certain pork products are impermissibly extraterritorial or otherwise fails the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). California's rule bans the sale of pork products from pigs that were born to a sow housed in certain conditions. *See* Cal. Health & Safety Code § 25990 et seq. The petitioners in *National Pork Producers Council* argue that this rule violates the Dormant Commerce Clause because it regulates pork farming occurring almost entirely outside the state, serves no local interests in California for the same reason, and imposes a substantial burden on interstate commerce without creating any meaningful benefit.

The Commerce Clause issues implicated by *National Pork Producers Council* are equally present in this case. California's ban on products resulting from

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

force feeding geese and ducks is purely extraterritorial; no foie gras is manufactured in California. And because there are no Californian ducks or geese to benefit from §25982, there are no local interests being served. Instead, California has passed a law that reaches *only* commerce outside the state in order to supposedly protect the welfare of animals outside the state. That law also fails to further any meaningful benefit under *Pike*, even more so than the law at issue in *National Pork Producers Council*. California's own Department of Agriculture has acknowledged that the production of foie gras "does not involve cruelty at any time." CA9.20-55882.Dkt.30 at SER-073. The United States has also concluded that "California 'has no legitimate interest in protecting' the welfare of animals located outside the State." Br. U.S. at 10, No. 21-468 (U.S. Jun.17, 2022).

Thus, this Court's resolution of *National Pork Producers Council* could very well resolve this case. The Court's holding regarding the legality of California's regulations on the extraterritorial production of pork will certainly bear on the legality of California's regulations on the extraterritorial production of foie gras. At a minimum, therefore, the Petition should be held pending a decision in *National Pork Producers Council*.

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

The size and scale of the American poultry and egg industry are enormous. The aggregate production value of broilers, eggs, turkey, and chickens totaled $46.1 billion in 2021. *See* UNITED STATES DEPARTMENT OF AGRICULTURE, POULTRY – PRODUCTION AND VALUE, 2021 SUMMARY (2022), available at https://www.uspoultry.org/economic-data/docs/broiler-production-and-value-2021.pdf. The Nation's poultry farms supplied Americans with some 9.13 billion broilers, 111 billion eggs, and 217 million turkeys. *Id.* In doing so, they employed more than 2 million people and paid out over $125 billion in wages and salaries. *See Poultry Feeds America*, US POULTRY & EGG ASSOCIATION (2022), https://www.poultryfeedsamerica.org/. All told, this vital industry contributes $555 billion to the US economy, more than 2% of total GDP. *See* John Dunham & Associates, *2022 Poultry and Egg Economic Impact Study* (October 18, 2022), at 2, available at https://poultry.guerrillaeconomics.net/res/Methodology.pdf.

While production tends to be concentrated in certain geographic regions, the industry as a whole is comprised of an elaborate, interstate reticulation of commercial relationships among farmers, processors, distributors, and consumers. Although the USDA's regulatory scheme is rigorous and demanding, it is also uniform and universal. Industry actors can rely with relative certainty on a single, consolidated federal scheme when investing in equipment, entering into contracts, developing a supply chain, and formulating ingredients in their poultry products.

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

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

that allowed each chicken ten square feet of living space at a constant temperature of 68 degrees. "Country style chicken" is defined by the USDA as "cut up chicken in which the wishbone is left whole." *See* USDA Policy Book at 43. Such a state statute would prescribe an "ingredient" requirement that is "in addition to, or different than" those required by federal law, and thus is on its face within the preemptive scope of 21 U.S.C. § 467e. *See Ass'n des Éleveurs*, 870 F.3d at 1147 (interpreting "ingredient" in the PPIA to mean a "physical component of a poultry product"). According to the Ninth Circuit, however, New York could salvage this restriction simply by restyling it as a "prohibition" on the sale of a "type of poultry" (i.e., "country style chicken" that contains the meat of chickens raised in a manner of which New York disapproves).

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

The text of the PPIA itself conveys Congress' conclusion that federal regulation of poultry products is needed to "prevent and eliminate burdens upon [interstate] commerce, to effectively regulate such

commerce, and to protect the health and welfare of consumers." 21 U.S.C. § 451. Concomitant with this unform regulatory scheme, the poultry and egg industry has developed industry-wide practices and expectations over decades on the foundational premise that if a poultry product conforms to the USDA's edicts, it may be properly distributed and sold nationwide. *See Schollenberger v. Comm. of Pa.*, 171 U.S. 1, 14 (1898) ("[W]e yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated…."). Congress' and the USDA's design of a stringent and comprehensive regulatory infrastructure—representing a carefully calibrated balance between economic efficiency and consumer expectations—confirms that state enactments concerning the content or composition of poultry products inevitably frustrate Congress' objectives. *See City of Burbank*, 411 U.S. at 639 (concluding that the "interdependence of [safety and efficiency] factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled").

This Court in *National Meat* acted decisively (at the preliminary injunction stage) to vindicate the FMIA's preemptive force against California's asserted prerogative "to decide which animals may be turned into meat." 565 U.S. at 465. California's current attempt "to decide which animals may be turned into" poultry products in defiance of the PPIA's identical preemption clause necessitates this Court's supervision. Congress has clearly stated in the PPIA its intent to preempt any state or local enactment—such as § 25982—that prohibits or regulates the sale of any poultry product that complies with federal

ingredient standards. The ability of the poultry and egg industry to continue effectively, efficiently, and safely serving American consumers depends upon the Court's willingness to enforce it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted or held for the resolution of *National Pork Producers Council*.

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