No. 22-472

In the Supreme Court of the United States

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

Petitioners,

v.

ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
AIMEE FEINBERG*
Deputy Solicitor General
MARK BECKINGTON
Supervising Deputy Attorney General
PETER CHANG
Deputy Attorney General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
1300 I Street
Sacramento, CA 95814
(916) 210-6003
Aimee.Feinberg@doj.ca.gov
**Counsel of Record*

February 2, 2023

QUESTIONS PRESENTED

1. Whether Section 25982 of the California Health and Safety Code, which prohibits the in-state sale of products resulting from force-feeding a bird, violates the dormant Commerce Clause.

2. Whether Section 25982 is preempted by the federal Poultry Products Inspection Act under principles of impossibility preemption.

3. Whether the district court abused its discretion by denying petitioners leave to amend their claim that the Poultry Products Inspection Act expressly preempts Section 25982.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

OTHER AUTHORITIES

STATEMENT

A. Legal Background

1. California Health and Safety Code Section 25981 prohibits force-feeding a bird within the State "for the purpose of enlarging the bird's liver beyond normal size, or hir[ing] another person to do so." Force-feeding a bird "means a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily," including by "delivering feed through a tube or other device inserted into the bird's esophagus." Cal. Health & Safety Code § 25980(b).

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

In adopting these provisions, the California Legislature considered evidence that the process of force-feeding ducks and geese causes extreme suffering. A legislative committee report noted that the force-feeding process begins when ducks are twelve to fifteen weeks old and involves a worker holding the bird "between his or her knees," "grasp[ing] the head," and inserting a ten- to twelve-inch tube into the bird's esophagus to deliver large amounts of concentrated meal and compressed air into the bird, "creating a golf ball-sized bulge as it goes down." Assemb. Comm. on

Bus. & Prof., Bill Analysis, S.B. 1520, at 4-5 (Cal. June 22, 2004). The process is repeated up to three times a day for several weeks. *Id.* at 5. According to the author, this method of feeding results in the bird's liver swelling to about ten times its normal size. *Id.* at 4. The Legislature considered additional evidence that, at the time it enacted Section 25982, only three entities in the United States produced foie gras, and more than a dozen countries had outlawed force-feeding birds for foie gras production. *Id.* at 5-6.

2. The federal Poultry Products Inspection Act (PPIA) establishes a national inspection scheme for poultry slaughtering and processing. 21 U.S.C. §§ 451-472. Originally enacted in 1957, the PPIA provides for federal inspection of slaughterhouses and poultry-processing plants (*id.* § 455); requires slaughterhouses and poultry-processing plants to follow proper sanitation practices (*id.* § 456(a)); prohibits the sale or transport of adulterated, misbranded, or uninspected poultry products (*id.* § 458(a)(2)); and proscribes false or misleading labeling of poultry products (*id.* § 457(c)). Congress gave the U.S. Department of Agriculture regulatory authority to implement the PPIA. *Id.* § 463(b).

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

Congress amended the PPIA in 1968 to (among other things) create a cooperative federal-state program for inspecting poultry sold only intra-state. 21 U.S.C. § 454. As part of those amendments, Congress

enacted 21 U.S.C. § 467e, the preemption provision at issue in this case.

The first sentence of Section 467e generally forbids States from imposing "[r]equirements within the scope of this chapter with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under this chapter[.]" 21 U.S.C. § 467e. An "official establishment" is a place where federal inspection of slaughtering or poultry processing occurs. *Id.* § 453(p).

The second sentence of Section 467e states that "[m]arking, labeling, packaging, or ingredient requirements . . . in addition to, or different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any official establishment in accordance with the requirements under this chapter[.]" 21 U.S.C. § 467e. States may, however, "consistent with the requirements under this chapter exercise concurrent jurisdiction" with USDA "over articles required to be inspected under this chapter for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment . . . ." *Id.*

Finally, Section 467e includes a savings clause that preserves state authority to "mak[e] requirement[s] or tak[e] other action, consistent with this chapter, with respect to any other matters regulated under this chapter." 21 U.S.C. § 467e.

B. Procedural Background

1. Petitioners are a New York producer of foie gras, a Canadian trade association, and a chef who wishes to sell foie gras in California. Pet. ii. In 2012,

they filed a complaint alleging that Section 25982 violates the Due Process Clause and the dormant Commerce Clause of the federal Constitution. *Canards I*, 729 F.3d at 942-943, 947.[1] The district court denied petitioners' motion for a preliminary injunction. *Id.* at 943. The court of appeals affirmed, holding that petitioners' claims were not likely to succeed. *Id.* at 946-953. With respect to the dormant Commerce Clause, the court rejected petitioners' theory that Section 25982 impermissibly regulates conduct occurring outside the State. *Id.* at 948-951. It also determined that petitioners were unlikely to prevail on their claim that Section 25982 imposes burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Id.* at 951 (discussing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)) (internal quotation marks omitted). This Court denied review. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 135 S. Ct. 398 (2014) (No. 13-1313).

2. a. On remand, petitioners amended their complaint to allege that the PPIA expressly and impliedly preempts Section 25982. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140, 1145 (9th Cir. 2017) (*Canards II*). They moved for summary judgment on three preemption theories: (i) that Section 25982 imposes an "ingredient requirement" that PPIA Section 467e expressly preempts; (ii) that Section 25982 is impliedly preempted under the doctrine of field preemption because the PPIA occupies the field of poultry product regulation; and (iii) that California law is impliedly preempted under

[1] The original complaint was filed on behalf of the two entity petitioners and a California restaurant group. D. Ct. Dkt. 1. The restaurant group was later replaced as a party by petitioner Chaney, the group's executive chef. *See* D. Ct. Dkt. 178.

principles of obstacle preemption because it obstructs the PPIA's objectives. *Id.* at 1145-1146; *see generally* D. Ct. Dkt. 118. The district court agreed that the PPIA expressly preempts Section 25982 and permanently enjoined the Attorney General from enforcing the statute against petitioners. *Canards II*, 870 F.3d at 1145.

b. The court of appeals reversed. *Canards II*, 870 F.3d at 1153. It first concluded that Section 25982 does not impose an "ingredient requirement" within the meaning of the PPIA. *Id.* at 1146-1152. Looking to the plain language of 21 U.S.C. § 467e, the statutory context, USDA regulations, and Congress's purpose, the court held that the term "ingredient requirement" addresses "the physical components of poultry products, not the way the animals are raised." *Canards II*, 870 F.3d at 1147. The term "cannot be read to reach animal husbandry practices," the court explained, "because the federal law 'does not regulate in any manner the handling, shipment, or sale of live poultry.'" *Id.* at 1148 (quoting H.R. Rep. No. 85-465, at 1) (emphasis and footnote omitted). And USDA itself has recognized that the PPIA gives it no authority to regulate the care or feeding of birds before they reach the slaughterhouse. *Id.*

The court acknowledged petitioners' contention that the USDA, through its 2005 Food Standards and Labeling Policy Book, imposed a federal requirement concerning how birds used for foie gras must be fed while alive. *See Canards II*, 870 F.3d at 1148 n.3. That agency guidance document states that "[g]oose liver and duck liver foie gras (fat liver) are obtained exclusively from specially fed and fattened geese and

ducks."[2] The court rejected petitioners' assertion that the Policy Book "*requires* foie gras to come from force-fed birds." *Id.* As the court had concluded in petitioners' first appeal, the Policy Book "'says nothing about the force feeding of geese and ducks.'" *Id.* (quoting *Canards I*, 729 F.3d at 950).

Applying the PPIA to the challenged provision, the court held that Section 25982 "contrasts starkly with the PPIA's conception of 'ingredient requirements.'" *Canards II*, 870 F.3d at 1148. It reasoned that Section 25982 "addresses a subject entirely separate from any 'ingredient requirement': how animals are treated long before they reach the slaughterhouse gates." *Id.* The court rejected petitioners' argument that Section 25982 nevertheless functions as a prohibited "ingredient requirement" by requiring foie gras products sold in California to be made with the "ingredient" of a non-force-fed liver. *See id.* at 1149. It explained that the "difference between foie gras produced with force-fed birds and foie gras produced with non-force-fed birds is not one of ingredient." *Id.* The "difference is in the treatment of the birds while alive." *Id.* (emphasis omitted). Indeed, to read "ingredient requirement" to encompass how an animal was raised or fed on the farm "would require [the court] to radically expand the ordinary meaning of 'ingredient.'" *Id.*

The court further rejected petitioners' claim that Section 25982 fell within the PPIA's preemption provision because it effectively banned the sale of all foie gras in California. *Canards II*, 870 F.3d at 1149-1150.

---

[2] U.S. Dep't of Agric., Food Safety & Inspection Serv., Office of Policy, Program and Emp. Dev., Food Standards & Labeling Policy Book (Aug. 2005) at 53, *available at* https://tinyurl.com/5dz29f4c (Policy Book).

To begin with, the court concluded that "nothing in the record before [it] show[ed] that force-feeding is *required* to produce foie gras." *Id.* at 1149. And "even if section 25982 results in the total ban of foie gras regardless of its production method, it would still not run afoul of the PPIA's preemption clause." *Id.* at 1150. The court reasoned that the PPIA sets standards for slaughtering, processing, and distributing poultry products. *Id.* "If foie gras is made, producers must, of course, comply with the PPIA. But if a state bans a poultry product like foie gras, there is nothing for the PPIA to regulate." *Id.*

Finally, the court rejected petitioners' two theories of implied preemption. *Canards II*, 870 F.3d at 1152-1153. The court explained that, under the doctrine of field preemption, "'States are precluded from regulating conduct in a field that Congress . . . has determined must be regulated by its exclusive governance.'" *Id.* at 1152. Here, petitioners' field-preemption argument "ignore[d] the states' role in poultry regulation" under the PPIA. *Id.* As for petitioners' obstacle-preemption claim, the court observed that obstacle preemption is a form of conflict preemption that occurs when the "challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 1153 (internal quotation marks omitted). In this case, nothing in Section 25982 impedes the PPIA's objectives of ensuring that poultry products are safe and properly labeled and packaged. *Id.*

c. In March 2018, petitioners filed a petition for a writ of certiorari urging this Court to review the court of appeals' rejection of all three of their preemption theories. This Court invited the United States Solicitor General to file a brief expressing the views of the

United States. That brief argued that the Court should deny the petition. Br. for the United States as Amicus Curiae at 1, 21, *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, No. 17-1285 (U.S. Br.). It explained that the court of appeals had correctly rejected petitioners' express- and implied-preemption claims and that those conclusions did not conflict with any decision of this Court or any other court of appeals. *Id.* at 10.

The United States' brief also asserted that petitioners' express-preemption claim would present "a more difficult question" if Section 25982 operated to bar the sale of any poultry products containing foie gras or "perhaps a particular type of foie gras that was a materially distinct substance, physically or chemically." U.S. Br. 14-15 (discussing arguments on each side of that question). The United States concluded, however, that there was no occasion to resolve that legal question because petitioners had not established the necessary "factual predicate" for such a claim—namely, "that liver for foie gras cannot be produced by a method other than force-feeding the geese or ducks." *Id.* at 15-16.

Petitioners filed a supplemental brief disputing the United States' understanding of the factual record and the legal conclusions to be drawn from it. Supp. Br. for Petitioners at 3-6, *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, No. 17-1285 (Supp. Br.). Petitioners first asserted that the record already demonstrated that force-feeding is the only way to make foie gras. *Id.* at 3 (characterizing as "demonstrably wrong" the assertion that "'nothing in the record shows that force-feeding is *required* to produce foie gras'") (ellipsis omitted). With respect to the legal sig-

nificance of the record, petitioners argued that the factual premise emphasized by the United States was not relevant. *Id.* at 4. In petitioners' view, "to fixate on whether there is more than one way to produce a poultry ingredient is to focus on an irrelevancy." *Id.* This Court denied the petition. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 139 S. Ct. 862 (2019) (No. 17-1285).

3. a. On remand for the second time, the district court allowed petitioners to amend their complaint again, this time to add further factual allegations in support of their dormant Commerce Clause claim and to plead a claim under the doctrine of impossibility preemption. Pet. App. 81-83. The court denied petitioners' request to amend their separate express-preemption claim to add factual allegations that foie gras cannot be produced by means other than force-feeding. *Id.* at 81, 83; *see* D. Ct. Dkt. 178 at 5-6. The district court explained that petitioners' proposed new allegations sought to relitigate issues that the court of appeals had already resolved. Pet. App. 81.

As amended, petitioners' complaint alleged three federal claims: that the PPIA preempts Section 25982 under principles of impossibility preemption; that Section 25982 violates the dormant Commerce Clause by regulating commerce occurring outside California; and that California's law offends the dormant Commerce Clause by imposing burdens on interstate commerce that are clearly excessive in relation to the putative local benefits. C.A. Dkt. 30-3 at 272-281. The complaint also pleaded a state-law claim seeking a declaration that Section 25982, on its own terms, does not cover certain sales by out-of-state sellers to California buyers. *Id.* at 270-272.

The district court denied petitioners' motion for partial summary judgment on their impossibility-preemption claim and dismissed all of their federal claims without leave to amend. Pet. App. 63-79. The court also dismissed the state-law claim, but allowed petitioners to file an amended motion for declaratory relief. *Id.* at 78-79. Petitioners subsequently filed another amended complaint and moved for summary judgment. D. Ct. Dkts. 213, 216. The district court entered a declaratory judgment that Section 25982 does not prohibit certain sales when the seller is located outside of California, such as when the sale is made over the Internet or by other remote means and the product is shipped from outside California to a buyer in the State. Pet. App. 53-60.

b. The State appealed the district court's declaratory judgment, and petitioners cross-appealed the dismissal of their federal claims. Pet. App. 7. The court of appeals affirmed. *Id.* at 1-29.

With respect to petitioners' impossibility-preemption theory, the court explained that such preemption occurs "when 'it is impossible for a private party to comply with both state and federal law.'" Pet. App. 10. Here, petitioners argued that they could not comply with both Section 25982 and federal law because the USDA requires foie gras to come from birds that are "'specially fed and fattened.'" *Id.* at 10-11. The court noted that petitioners' purported definition of foie gras appears in a USDA Policy Book—not in the text of the PPIA or an agency regulation adopted after notice and comment and carrying the force of law. *Id.* at 11. But even assuming that federal law required force-feeding, the court concluded that California's sales restriction still would not conflict with it. *Id.* at 11-15. The court reasoned that Section 25982 "is neither a command to

market non-force-fed products as foie gras nor to call force-fed products something different." *Id.* at 11. "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." *Id.* at 14.

The court recognized that this Court rejected a "'stop-selling'" rationale in *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472 (2013). Pet. App. 13-15. But it explained that petitioners' arguments "stretch[ed] [*Bartlett*'s] reasoning too far." *Id.* at 13. *Bartlett* "does not prohibit states from imposing regulations that might require a manufacturer to withdraw from the market; it merely rejects the 'stop-selling' rationale as an escape hatch when state and federal law impose conflicting obligations." *Id.* Here, there are no such conflicting obligations. *See id.* at 14. And *Bartlett* "does not erase states' authority to prohibit the sale of certain products within their borders." *Id.* at 15.

Turning to petitioners' express-preemption theory, the court of appeals held that the district court did not abuse its discretion when it denied petitioners leave to amend that claim. Pet. App. 15-17. Petitioners sought to add new factual allegations regarding their contention that foie gras cannot be made without force-feeding. *See id.* But the court of appeals had already concluded in the prior appeal that Section 25982 did not impose a preempted "ingredient requirement" under the PPIA's express-preemption provision, even if it effectively prohibited all foie gras sales in the State. *Id.* at 16. Petitioners failed to advance any new argument that could prevail in light of that holding. *Id.*

The court of appeals next held that the district court was correct in dismissing petitioners' dormant Commerce Clause claims. Pet. App. 18-22. Citing its

prior precedent in *National Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022) (No. 21-468), the court of appeals determined that Section 25982 does not regulate out-of-state commerce in violation of the dormant Commerce Clause because it only restricts sales that are within the State. Pet. App. 18-20. Even if the statute has the effect of influencing out-of-state producers' conduct, the court explained, its limitation on in-state sales is not impermissibly extraterritorial. *Id.* at 20. The court also affirmed the dismissal of petitioners' claim under *Pike*. *Id.* at 21-22.

Finally, the court of appeals affirmed the entry of declaratory relief on petitioners' state-law claim. Pet. App. 22-29. The court agreed that Section 25982 does not prohibit the Internet sales or other remote sales by out-of-state sellers addressed in the district court's order. *Id.* at 25-29.

Judge VanDyke concurred in part and dissented in part. Pet. App. 29-47. He agreed with the majority's interpretation of Section 25982 but disagreed with its conclusions regarding petitioners' preemption theories. *Id.* at 29-30. With respect to impossibility preemption, he would have held that compliance with both state and federal law is not possible because, in his view, "the only way to make foie gras that complies with federal requirements is through force-feeding." *Id.* at 30 (emphasis omitted). The dissent also would have allowed petitioners to amend their express-preemption claim in light of new evidence in the record and what it concluded were "outdated assumptions and erroneous reasoning" in the prior panel decision. *Id.* at 47. Judge VanDyke did not reach petitioners' dormant Commerce Clause challenge in light of his

conclusions regarding petitioners' preemption theories. *Id.* at 30 n.1.

The court of appeals subsequently denied a petition for panel rehearing and rehearing en banc. Pet. App. 85.

ARGUMENT

None of the three questions presented in the petition warrants this Court's plenary review. Under the circumstances of this case, however, it would be appropriate for the Court to hold the petition pending this Court's resolution of *National Pork Producers Council v. Ross*, No. 21-468 (argument held Oct. 11, 2022). Both this case and *National Pork* involve questions concerning the scope of the dormant Commerce Clause and its application to state laws regulating the in-state sale of products. The Court's forthcoming decision in *National Pork* might therefore inform the proper disposition of petitioners' constitutional claims. As to preemption, this Court has already declined to review multiple preemption theories advanced by petitioners. Petitioners' current arguments substantially track those in their prior petition. The lower courts correctly rejected petitioners' new impossibility-preemption claim and properly denied leave to amend the express-preemption claim. The decision below does not implicate any conflict in the lower courts, and petitioners identify no factual or other developments that would make their current petition any more compelling a candidate for review than their prior one.

1. Petitioners argue that Section 25982 violates the dormant Commerce Clause by regulating commerce occurring outside California and by imposing substantial burdens on interstate commerce that are

clearly excessive in relation to the law's local benefits. *See* Pet. 5-6, 32-33. In *National Pork Producers Council v. Ross*, the Court is considering similar theories in a case challenging a law restricting the in-state sale of certain pork products. Although petitioners' arguments differ in some respects from those asserted in *National Pork*, the Court's decision in *National Pork* might affect the proper resolution of petitioners' claims here. Accordingly, it would be appropriate for the Court to hold the present petition until it decides *National Pork*.

There is no reason, however, for this Court to grant plenary review of petitioners' dormant Commerce Clause claims, as the petition urges. *See* Pet. 6. The petition does not discuss those claims at length, but the few contentions it does advance lack merit. For example, petitioners contend that the decision below is inconsistent with this Court's decision in *C&A Carbone, Inc. v. Town of Clarkston, N.Y.*, 511 U.S. 383 (1994). Pet. 32. A similar argument is before the Court in *National Pork*, and it is unpersuasive for the same reasons that the State explained there. Br. for State Respondents at 21, *Nat'l Pork Producers Council v. Ross*, No. 21-468. Nor does the decision below conflict with *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd on other grounds by Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), as petitioners contend. *See* Pet. 32. In *Natsios*, the First Circuit applied the Foreign Commerce Clause to invalidate a Massachusetts law limiting state procurement from companies doing business in Burma. 181 F.3d at 45-46, 61-71. The court did not address a claim, like petitioners' here, that an in-state sales restriction is invalid merely because out-of-state producers might respond to it by opting to modify their production practices.

Petitioners also contend that California lacks a local interest in restricting sales of animal products made through inhumane practices when the animals are raised outside the State. Pet. 5-6. But Californians plainly have an interest in whether local retailers or restaurants are contributing to a market that they view as immoral. As this Court has recognized, advancing "the public morals" within a State is a longstanding and legitimate state interest. *W. Union Tel. Co. v. James*, 162 U.S. 650, 653 (1896); *see also* Br. for State Respondents at 45-47, *Nat'l Pork Producers Council v. Ross*, No. 21-468.

2. Petitioners' impossibility-preemption claim does not warrant plenary review. This Court previously declined to review petitioners' theories of express, field, and obstacle preemption. Those claims alleged that Section 25982 imposes an "ingredient requirement" that PPIA Section 467e expressly preempts; that the PPIA exclusively occupies the field of poultry regulation; and that Section 25982 conflicts with federal law by erecting an obstacle to the accomplishment of the PPIA's objectives. *Supra* pp. 4-5; *see generally Arizona v. United States*, 567 U.S. 387, 399-400 (2012) (describing doctrines of express, field, and obstacle preemption). Petitioners now focus on a fourth form of preemption—"impossibility preemption"—but they furnish no persuasive reason why that newly pleaded claim provides any more compelling reason for review than the first three.

Like obstacle preemption, impossibility preemption is a form of conflict preemption. *Arizona*, 567 U.S. at 399. It occurs when "it is 'impossible for a private party to comply with both state and federal requirements.'" *Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 480 (2013) (quoting *English v. Gen. Elec. Co.*, 496

U.S. 72, 79 (1990)). "Impossibility pre-emption is a demanding" doctrine. *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). The "possibility of impossibility is not enough." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1678 (2019) (internal quotation marks and alterations omitted).

The court of appeals here correctly held that this doctrine does not apply in the circumstances of this case. Petitioners' argument rests on the premise that federal law requires foie gras to be made from the liver of a force-fed bird. *E.g.*, Pet. 24-25. But they point to no provision of the PPIA or any binding federal regulation imposing such a requirement. That is because the PPIA does not address how animals are fed long before they reach the slaughterhouse gates. *Supra* pp. 2, 5; *see also* U.S. Br. 11 ("PPIA does not regulate the treatment of farm animals at all").[3]

Petitioners point instead to USDA's 2005 Policy Book and its language, also included in a 1984 policy memo, describing liver in foie gras products as "obtained exclusively from specially fed and fattened" geese and ducks, which they contend established a uniform federal requirement that foie gras must be

---

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

made through force-feeding. *See* Pet. 9, 22-25. But the Policy Book does not "*require[]* foie gras to come from force-fed birds." *Canards II*, 870 F.3d at 1148 n.3. As the United States previously informed this Court, the Policy Book is an agency "guidance document" that "addresses only the names that may be used in labeling to describe various foie gras products." U.S. Br. 17; *see also* Policy Book 2 ("Policy Book is intended to be guidance to help manufacturers and [*sic*] prepare product labels that are truthful and not misleading"). "It does not embody any USDA determination about which foie gras products are permissible." U.S. Br. 17.

That clarification confirms that petitioners' reliance on this Court's decision in *Bartlett* is mistaken. *See* Pet. 24-26. In *Bartlett*, there was a clear conflict between the duties imposed by state and federal law; the only way for the manufacturer to avoid that conflict was by discontinuing sales of its product. 570 U.S. at 490 (federal law requires specific label; "state law forbids the use of that label"). Here, as just explained, there is no federal law requiring foie gras to be produced by force-feeding.[4]

For the same reason, petitioners are wrong in claiming that the decision below conflicts with this

---

[4] There is also no agreement between the United States and France to require all foie gras products sold in this country to come from force-fed birds. *See* Republic of France Br. 3, 6-8; *see also* Br. of Republic of France as Amicus Curiae at 12-14, *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, No. 17-1285 (making similar argument). The 1983 letter and 1984 policy memo cited in support of that argument focus on the different issue of developing standard labeling terminology for foie gras products. *See* C.A. Dkt. 30-3 at 193-194, 207-208.

Court's decision in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). *See* Pet. 4. There, the Court observed that 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*, 373 U.S. at 142-143. There is no similar dynamic here. *See* Pet. App. 74-75.[5]

More broadly, nothing in the PPIA reflects a congressional judgment that States must allow all USDA-approved products to be sold within their markets. The PPIA establishes inspection, sanitation, and labeling standards to prevent the distribution of adulterated or misbranded poultry products. *See* 21 U.S.C. §§ 455, 456(a), 457(c), 458(a)(2). It does not address animal-welfare issues, such as how farmers feed live animals. *Supra* p. 2; *see also* U.S. Br. 11. The law thus does not preclude a State from barring the sale of a product based on how the animal was treated while alive on the farm. *See Canards II*, 870 F.3d at 1150-1151; *cf. Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 333 (5th Cir. 2007) (limitations on States' ability to regulate meat inspection and labeling under the analogous Federal Meat Inspection Act do not deprive States of their authority to regulate the types of meat that may be sold).[6]

---

[5] *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898), on which petitioners also rely (at 29-30), is not relevant. That case involved a Commerce Clause challenge to a prohibition on the sale of oleomargarine nearly sixty years before the PPIA was first adopted. *Schollenberger*, 171 U.S. at 6.

[6] The petition misunderstands respondent's position in the court of appeals. *See* Pet. 24. In that court, as in this one, respondent's

3. Finally, petitioners' express-preemption arguments also do not warrant this Court's review. Although petitioners principally focus on their underlying contention that Section 25982 is an "ingredient requirement" expressly preempted by the PPIA, that question is not directly before this Court. The decision below did not address the underlying merits of petitioners' express-preemption claim because the issue before the court of appeals was whether the district court had abused its discretion in denying petitioners leave to amend the claim. *Supra* p. 11. And none of the factual or legal arguments advanced by petitioners here establish that the court of appeals erred in holding that there was no abuse of discretion.

a. Petitioners acknowledge that the court of appeals previously rejected their express-preemption theory and that this Court denied discretionary review. Pet. 15-16; *see* Pet. for a Writ of Certiorari at 12-16, *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, No. 17-1285 (17-1285 Pet.). But they argue that subsequent factual developments have improved the framing of their claim. Pet. 34-35. In particular, they contend that they have submitted further record evidence supporting what they now describe as an "essential premise" of their claim: their assertion that the only way to make foie gras is by force-feeding a bird. *Id.* at 34; *see* U.S. Br. 13-16.

---

brief argued that the PPIA does not require States to allow the sale of all USDA-approved products within their borders. C.A. Dkt. 37 at 23-24 (respondent's principal brief on federal claims). Respondent also made clear at the oral argument that a state law banning foie gras altogether would not be preempted. *See* https://www.ca9.uscourts.gov/media/video/?20211018/20-55882/ at 27:35 - 28:43.

In the prior proceedings before this Court, however, petitioners argued that the prior record *already* demonstrated that force-feeding was the only method available for making foie gras. Supp. Br. 3-4. In any event, the current record does not "conclusively establish[]" that purported fact, as petitioners contend. *See* Pet. 34. The evidence in petitioners' new declarations was disputed. C.A. Dkt. 30-3 at 117-120 (respondent's statement of genuine disputes of material fact) (citing, *inter alia*, *Canards II*, 870 F.3d at 1149 n.5 (discussing alternative methods for producing foie gras)); *see also* D. Ct. Dkt. 206 at 16-18 (respondent's request that district court defer entry of summary judgment under Federal Rule of Civil Procedure 56(c) and allow discovery if it concluded that availability of alternative production methods was legally relevant). And the district court dismissed petitioners' claims as a matter of law, without making any finding that those declarations were sufficient to establish the absence of a material dispute on the issue. *See* Pet. App. 78.

More significantly, petitioners' new evidence on the lack of alternative methods for producing foie gras is not relevant to whether the PPIA expressly preempts Section 25982. Petitioners themselves conceded that point when they responded to the United States' brief in 2018. In their words, "to fixate on whether there is more than one way to produce a poultry ingredient is to focus on an irrelevancy." Supp. Br. 4. As explained above, the PPIA does not purport to regulate poultry products based on how the animals were fed while alive on the farm, and it does not expressly preempt a statute like Section 25982. *Supra* pp. 2, 5-7; *see also* Br. in Opposition at 7-9, *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, No. 17-1285 (explaining why Section 25982 is not a preempted "ingredient requirement").

b. Petitioners' remaining contentions largely recycle unsuccessful arguments from their 2018 petition. As in their prior petition, petitioners contend that the decision below conflicts with *National Meat Association v. Harris*, 565 U.S. 452 (2012). Pet. 27-29; *see* 17-1285 Pet. 12-16. That case involved the Federal Meat Inspection Act (FMIA), which contains a preemption provision substantially similar to that in the PPIA. *Nat'l Meat*, 565 U.S. at 458. The Court considered whether that provision preempted a California statute barring the in-state sale of meat from non-ambulatory pigs. *Id.* at 463-464. The challenger alleged that the state statute was displaced by the first sentence of the FMIA's preemption provision, which (like the PPIA's) preempts additional or different "[r]equirements within the scope of [the FMIA] with respect to premises, facilities and operations of any establishment at which inspection is provided[.]" 21 U.S.C. § 678; *see Nat'l Meat*, 565 U.S. at 458.

The Court held that the statute was preempted. *Nat'l Meat*, 565 U.S. at 463-464. It recognized that the FMIA's preemption provision generally does not foreclose state regulation of the commercial sales activities of slaughterhouses. *Id.* at 463. But the prohibition on the sale of meat from non-ambulatory pigs "function[ed] as a command to slaughterhouses [how] to structure their operations[.]" *Id.* at 464. In that circumstance, failing to extend preemption to the sales ban would allow a State to regulate slaughterhouses "just by framing [the law] as a ban on the sale of meat produced in whatever way the State disapproved." *Id.* And the FMIA reserved regulation of slaughterhouse activities to the federal government. *See id.* at 455-458.

Nothing in *National Meat* suggests that the sales ban at issue in this case is a preempted "ingredient requirement." To begin with, *National Meat* addressed only the first sentence of the FMIA's preemption provision, which restricts state regulation of "'premises, facilities and operations'" of slaughterhouses and processing plants. 565 U.S. at 458. It did not consider the meaning of the term "ingredient requirement," which is the statutory language at issue here. And unlike the state law in *National Meat*, Section 25982's prohibition on in-state sales of products resulting from force-feeding birds does not have the effect of circumventing a federal statute by indirectly regulating a subject reserved to federal authority. "Ingredient requirements" under the PPIA do not extend to the way a bird was fed while alive on the farm. *Supra* p. 5. A prohibition on selling products resulting from bird force-feeding therefore does not implicate anything addressed by the federal statutory regime.

Petitioners emphasize (at 28) that *National Meat* rejected the conclusion that "'states are free to decide which animals may be turned into meat.'" 565 U.S. at 465. More precisely, what the Court explained was that the FMIA alone dictates what animals may be processed for human consumption when those animals are "on a slaughterhouse's premises." *Id.*; *see also id.* (FMIA and its regulations "ensure that some kinds of livestock delivered to a slaughterhouse's gates will not be turned into meat") (emphasis omitted). But the Court did not suggest that the FMIA negated state sales bans related to activities that occur far from the slaughterhouse doors. *See id.* at 465-467; *see also* U.S. Br. 16-17 (rejecting petitioners' analogy to *National*

Meat). *National Meat* thus provides no support for petitioners' claim that the PPIA expressly preempts the state sales ban at issue here.

c. As in their prior petition, petitioners also argue that the court of appeals departed from decisions of the Fifth and Sixth Circuits. *Compare* Pet. 30-32, *with* 17-1285 Pet. 16-19. As before, petitioners are incorrect.

In *Armour & Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972), the Sixth Circuit held that a Michigan law that prescribed standards for the contents of sausage that could be sold in that State imposed "ingredient requirements" under the FMIA. *Id.* at 82-84. Under Michigan's statute, saleable sausage could be made only with certain skeletal meats from cattle, swine, or sheep. *Id.* at 81. The statute prohibited the use of various animal organs; limited the permissible moisture content; required a minimum protein content; and restricted the percentage of "'trimmable fat'" in certain sausage products. *Id.* at 86-87. Those standards were preempted "ingredient requirements" because they dictated the precise content of meat products. *See id.* at 83-84. The statute did not (as here) concern the sale of meat from an animal that was fed in a particular way while alive. *See* U.S. Br. 20 (unlike law in *Armour*, California's Section 25982 "does not impose such ingredient requirements").

In *Mississippi Poultry Association, Inc. v. Madigan*, 31 F.3d 293 (5th Cir. 1994) (en banc), the Fifth Circuit considered whether a USDA regulation fixing inspection standards for foreign-produced products was consistent with the PPIA's requirement that imported poultry products comply with the same inspection standards that apply domestically. *Id.* at 295.

That case did not address the meaning of "ingredient requirement" under the Act or resolve any preemption claim. And the Fifth Circuit's observations about the PPIA's nationally uniform regulatory structure (*see* Pet. 31-32) "do not reflect a determination that the PPIA's regulatory scheme encompasses feeding and other farming practices." U.S. Br. 20.

Petitioners do not identify any new legal developments since the Court declined to review the same purported conflict they asserted in 2018. Indeed, so far as the State is aware, the Ninth Circuit's prior decision in this case and the Sixth Circuit's decision in *Armour* remain the only two federal appellate decisions to have interpreted the term "ingredient requirement" under the FMIA or PPIA since Congress enacted the PPIA's preemption provision more than 50 years ago. There is no conflict or confusion in the lower courts, and no need for further review by this Court.

CONCLUSION

The Court should hold this petition for a writ of certiorari pending the Court's resolution of *National Pork Producers Council v. Ross*, No. 21-468, and then dispose of the petition as appropriate in light of the decision in that case.

Respectfully submitted,

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
AIMEE FEINBERG
Deputy Solicitor General
MARK BECKINGTON
Supervising Deputy Attorney General
PETER CHANG
Deputy Attorney General

February 2, 2023