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

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF REPLY

After ten years of litigation, three published opinions from the Ninth Circuit, two previous petitions, an uncontested factual record on summary judgment, and a dissent that correctly calls out the majority's preemption "solution" as "having already been flatly rejected by the Supreme Court," App. 37, this case is more than ready for the Court's plenary review. The Court should grant the petition to address — together — the pressing federal preemption and dormant Commerce Clause questions that it uniquely presents.

The petition is well-supported by the U.S. Poultry & Egg Association — showing the impact of this case far beyond foie gras — by a Canadian trade association representing billions of dollars of foreign commerce, by the government of France — which decades ago obtained USDA's agreement to the federal definitions of some of its most prized poultry products — and by several national, nonpartisan organizations committed to preserving the free interstate market that our Framers intended. On Petitioners' prior petition raising related preemption issues under the PPIA, eleven States also urged this Court to grant review. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, No. 17-1285; *see also Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, No. 13-1313 (supported by 13 States).

Moreover, on remand from this Court, Petitioners established the "critical premise" — i.e., the "factual predicate" of the physical impossibility of somehow producing a federally-approved poultry ingredient without using the necessary agricultural method that

California prohibits — that the Solicitor General, in response to our prior petition in this case, explained would present questions worthy of the Court's review. Br. U.S. in No. 17-1285 (U.S. Dec. 4, 2018) at 14-16. There is thus simply no vehicle issue at this point, and the case is now perfectly primed for the Court to resolve the important preemption issues on the merits.

In addition, the position of the United States on the dormant Commerce Clause question presented is now clear from a related case — and bolsters what Petitioners urged a decade ago in their first petition: California has no business telling farmers in other States and countries how much to feed their flocks as a condition to the sale of the wholesome, unadulterated, USDA-approved meat and poultry products made from those animals. *Éleveurs*, No. 13-1313, at 4. As the United States has put it, "California has no cognizable interest in the welfare of animals located in other States." Br. U.S. 19 in *Nat'l Pork Producers Council v. Ross*, No. 21-468 (*National Pork*).

Respondent's opposition serves up only weak sauce. As further addressed below, his suggestion that Petitioners' current petition does not raise any new preemption claim or identify any "factual or other developments that would make their current petition any more compelling a candidate for review than their prior one," Opp. 13, is demonstrably wrong. As Respondent later admits, this petition presents the question of impossibility preemption for the first time — and highlights the Ninth Circuit refusal to apply this Court's several precedents as the panel majority told Petitioners they may avoid

impossibility preemption by forever ceasing their sales in California. Yet this Court could not have been more emphatic in *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013), when it held: "***We reject this 'stop-selling' rationale as incompatible with our pre-emption jurisprudence.***" *Id.* at 487. The Ninth Circuit's defiance on that point alone warrants this Court's immediate review.

In any event, in light of the similarity of the dormant Commerce Clause issues in this case and in *National Pork*, Respondent concludes that "[t]he Court should hold this petition for a writ of certiorari pending the Court's resolution of *National Pork*." Opp. 25. If the Court does not grant the petition outright, then holding it pending the opinion in the pork case would make sense at this point in the term — though the major preemption questions that this petition squarely presents warrant plenary review regardless of any GVR that may result following the decision in *National Pork*.

I. The Petition Presents Pressing Questions of Federalism as California Continues Its Unprecedented Efforts to Ban Federally-Approved Agricultural Products.

The Court need only consider some of its pronouncements about state regulation of federally-inspected foods to see just how far afield the Ninth Circuit majority's opinion (and California itself) has strayed from this Court's governing decisions. In *Schollenberger v. Pennsylvania*, 171 U.S. 1, 14 (1898), the 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." In *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), the Court held: "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." In *National Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012), under a provision of an identical preemption clause, the Court 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." Yet, with the Ninth Circuit's blessing, California today is getting away with what this Court has forbidden to it as a matter of federalism for a century.

When the Ninth Circuit majority wrote that, "[u]nfortunately for the sellers, the [federal] definition of foie gras is ***beside the point***" because, even assuming USDA requires force feeding, the sellers "just cannot sell those products in California," App. 11, it displayed a stunning disregard of a federal statutory framework, the PPIA, which has the same ingredient preemption clause as the FMIA's that this Court unanimously held "sweeps widely." *Nat'l Meat*, 565 U.S. at 459. And it directly departed from this Court's impossibility preemption doctrine in *Bartlett* — a quintessential basis for granting review. S. Shapiro *et al.*, Supreme Court Practice 250 (10th ed. 2013) ("A direct conflict between the decision of the court of appeals … and a decision of the Supreme Court is one of the strongest possible

grounds for securing the issuance of a writ of certiorari.").

Why does Congress require uniform federal inspection — and why do producers even submit to it — if not to obtain the right to sell their meat and poultry products in interstate commerce free from the kinds of restrictions that California is imposing on agriculture products ranging from foie gras to bacon and eggs? It will take another merits decision from this Court to bring the Ninth Circuit back in line and to align it with the sound decisions of the Fifth and Sixth Circuits. *Miss. Poultry Ass'n v. Madigan*, 3 F.3d 293, 295-296 (5th Circ. 1994) ("Congress thus subjected all domestic poultry production sold in interstate commerce to a single, federal program with uniform standards."); *Armour & Co. v. Ball*, 468 F.2d 76, 81 (6th Cir. 1972) ("[T]he 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.").

II. California's Arguments in Opposition Are Unpersuasive.

Respondent makes a series of attempts to buttress the Ninth Circuit majority's holdings. But none of them fly.

Respondent first claims that there have been no "factual or other developments that would make" this petition "any more compelling" than our most recent one (which led the Court to call for the views of the United States). Opp. 13. But that wholly ignores the

uncontroverted evidence of physical impossibility that Petitioners introduced to establish the "critical premise" identified by the Solicitor General.[1] While the Ninth Circuit majority then called that same proof "immaterial," App. 16, it did so only because it considered itself bound by the panel's prior decision in this case, *id.* The dissent pointed up the earlier decision's "flawed analysis," App. 30-31, and even the majority observed that it was stuck with that precedent "unless overruled by a body competent to do so." App. 17. This Court is certainly that body.

An even bigger miss for Respondent is his claim that the "definitions and standards of identity or composition" that Congress expressly authorized the Secretary of Agriculture to prescribe for any poultry product under the PPIA — "whenever he determines such action is necessary for protection of the public," 21 U.S.C. § 457(b)(2) — and that USDA has prescribed for foie gras products, somehow do not "embody any USDA determination about which foie gras products are permissible." Opp. 17 (quoting Br. U.S. in 17-1285 at 17). But Respondent admitted in this case 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. Which makes it impossible to argue that laws like California's § 25982 do not conflict with the federal framework ensuring that USDA-approved

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[1] Instead of citing to any record *evidence* to the contrary, Respondent is relegated to relying on a footnote in a prior Ninth Circuit opinion that tendentiously pointed to a triple-hearsay NPR story and TED Talk "parable" about a farmer of geese in Spain, Opp. 20 — which is nowhere in the actual record in this case.

poultry products "are an important source of the Nation's total supply of food." 21 U.S.C. § 451.

On the question of express preemption of ingredient requirements under the PPIA, Respondent tries to claim that, because Congress itself did not enact separate statutory definitions for the innumerable meat and poultry products that American producers create, or because definitions of these countless products are not promulgated in federal regulations, the definitions that USDA's Food Safety and Inspection Service has established somehow do not have any preemptive effect. Opp. 16-17. But the preemptive effect is established by section 467e of the PPIA itself, which expressly preempts "ingredient requirements … in addition to, or different than, those made under this chapter." 21 U.S.C. § 467e. It is thus not the fact that the definitions and standards for Petitioners' poultry products appear in a "Policy Book" that covers hundreds of meat and poultry products which gives them preemptive effect but, rather, that Congress expressly authorized USDA to issue them.

Finally, Respondent cannot escape the uncontroverted factual record below. So Respondent paints the pivotal express preemption issue as one of mere procedure based on the district court's refusal to let Petitioners proceed with it. (Respondent even tries to reframe the first question presented by Petitioners as "whether the district court abused its discretion by denying petitioners leave to amend" that claim. Opp. i.) But this ignores the extensive *substantive* battle between the majority and dissent about how ingredient preemption applies under a major federal statute that affects countless poultry products sold in

California and other States in the Ninth Circuit. App. 15-17, 39-47.

Finally, Respondent suggests that, because the last published court of appeals decision to address express ingredient preemption was the Sixth Circuit's decision in *Armour & Ball* over 50 years ago, the Court can look past the Ninth Circuit's problematic opinion here. But, in light of the billions of meat and poultry products that go into our Nation's food supply, that is not what this Court did when it granted review in *National Meat* on questions of preemption — without any circuit conflict — and unanimously reversed the Ninth Circuit's similarly troubling opinion in 2012. The Court should do the same here.

III. If the Court Does Not Grant the Petition Outright, then — as Respondent Agrees — the Court Should Hold the Petition Pending Its Decision in *Nat'l Pork Producers Council v. Ross*, No. 21-468.

In any event — as Respondent agrees, Opp. 25 — the petition should at minimum be held until this Court's decision in *National Pork*, a case argued this term that Petitioners presaged when they raised the same dormant Commerce Clause issues a decade ago. *See Éleveurs*, No. 13-1313, Pet. 22 ("If the Ninth Circuit is not directed to adhere to this Court's jurisprudence on the limits of State-on-State regulation, then its published opinion in this case will serve as a green-light for untold extraterritorial overreaching"); *see also Éleveurs*, No. 17-1285, Pet. Supp. Br. 12 ("First they came for the foie gras …").

On the issue of extraterritorial regulation, *National Pork* asks whether California may ban pork from pigs raised out-of-state without as much space as California dictates for its own — or whether the Constitution prohibits such trade restrictions when "the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). The petition in our case similarly asks whether California may ban Petitioners' duck products "based exclusively on the farming practice by which the animals were raised in other States and countries." Pet. i. Indeed, the regulation in our case is even farther-reaching than in *National Pork* since it functions as a ban on *all* foie gras based on the agricultural method Petitioners use in New York and Canada.

On the issue of when a State has a legitimate local interest that would outweigh a regulation's burden on interstate commerce under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the petition in the pork case asks whether a State's "preferences regarding out-of-state housing of farm animals" are a cognizable such interest. As the United States explains in its brief in *National Pork*, "California 'has no legitimate interest in protecting' the welfare of animals located outside the State." Br. U.S. in 21-468 at 10 (citation omitted). The petition here asks the same question — with the additional strength that the ban in our case does not protect a *single* duck or goose in California (since no foie gras is produced in California as a result of a separate statute banning production). Indeed, § 25982 effectively operates not merely to "burden" commerce

but to completely blockade California's market to ***all*** foie gras products.

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If the opinion in *National Pork Producers* clarifies the continuing vitality of this Court's precedents ensuring a nationwide free market under dormant Commerce Clause doctrine, *e.g., Hunt v. Wash. State Apple Advertising Comm'n*, 432 U. S. 333, 350 (1977) (referring to "the Commerce Clause's overriding requirement of a national 'common market'"), then the Court can certainly resolve the petition in this case by granting it, vacating the judgment of the Ninth Circuit, and remanding for further proceedings consistent with the opinion in the pork case.

But even if the decision in *National Pork Producers* were to foreclose the petitioners in that case from pursuing their dormant Commerce Clause claims, the Court should *still* grant this petition on at least the two independent preemption questions that it uniquely presents. That is because this case gives the Court a perfect vehicle to address overarching issues of federalism that have been briskly brewing since at least our first petition in this case ten years ago: whether a State may ban wholesome poultry products from animals raised entirely in other States where every such product has been federally-inspected and Congress "has affirmatively pronounced the article to be a proper subject of commerce." *Schollenberger*, 1717 U.S. at 8.

As the dissent observed below, "the majority today rewards California for doing explicitly what the Supreme Court faulted it for doing implicitly: imposing state requirements on a process regulated

by the federal law." App. 36. That is reason enough for the Court to take up this case today.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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