No. _____

IN THE

Supreme Court of the United States

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC; HVFG LLC; AND HOT'S RESTAURANT GROUP, INC.,

Petitioners,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

All poultry products sold in commerce in America are subject to the federal Poultry Products Inspection Act (PPIA), which contains an express preemption clause that prohibits States from imposing any "ingredient requirements" that are "in addition to, or different than," those established under the PPIA. In *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012), this Court unanimously held that an identical preemption clause in the Federal Meat Inspection Act "sweeps widely." It also held that a State may not avoid federal preemption of a State regulation of meat production "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."

The questions presented are:

1. Whether a State's ban on the sale of wholesome, federally-approved poultry products based on the State's disapproval of the way in which the poultry ingredient was produced imposes an "ingredient requirement" in addition to or different than those in the Poultry Products Inspection Act.

2. Whether Congress has preempted the field of poultry products ingredients, as the Fifth and Sixth Circuits have long held — or not, as the Ninth Circuit has just held.

RULE 29.6 STATEMENT

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

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

Hot's Restaurant Group, Inc. (Hot's Kitchen), is a California corporation that sells foie gras products from the Canadian Farmers and Hudson Valley in California. Hot's Kitchen has no parent corporation, and no publicly held company has a 10% or greater ownership interest in Hot's Kitchen.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The Ninth Circuit's published opinion is reported at 870 F.3d 1140 and reprinted in the Appendix (App.) at 1a-26a. The Ninth Circuit's order denying rehearing *en banc* is reprinted at App. 51a-52a. The district court's order granting summary judgment is published at 79 F. Supp. 3d 1136 and reprinted at App. 27a-50a.

JURISDICTION

The Ninth Circuit filed its opinion on September 15, 2017. App. 1a. It denied Petitioners' timely petition for rehearing en banc on November 9, 2017. App. 51a. On January 26, 2018, Justice Kennedy extended the time for filing this petition until March 9, 2018. *See Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*, No. 17A793 (U.S. 2018). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides:

> [T]he Laws of the United States … shall be the supreme Law of the Land; and the Judges

> in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The federal Poultry Products Inspection Act provides:

> [I]ngredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) in addition to, or different than, those made under this chapter may not be imposed by any State … with respect to articles prepared at any official establishment in accordance with the requirements under this chapter[.]

21 U.S.C. 467e.

The California statute that Petitioners challenge here provides:

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

Cal. Health & Safety Code § 25982.

INTRODUCTION

This case happens to involve foie gras, perhaps the most maligned (and misunderstood) food in the world. But the fundamental issue decided by the Ninth Circuit — whether a State may require that a federally-approved poultry product sold in commerce not contain a poultry ingredient produced in a way

the State disapproves — affects the entire meat and poultry industry in our Nation. Indeed, the federal Poultry Products Inspection Act (PPIA) — which expressly preempts the imposition by a state of any "ingredient requirements . . . in addition to, or different than," those established under federal law, 28 U.S.C. § 467e — applies to every poultry product sold in commerce in America, including, as the Ninth Circuit recognized, to "regular chicken." App. 16a.

A writ of certiorari from this Court is necessary for at least three independent reasons. First, the Ninth Circuit's opinion contravenes the principles of preemption that this Court articulated when it unanimously reversed the Ninth Circuit just six years ago in *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012). That case involved a ban on the sale of meat from non-ambulatory pigs in spite of an express preemption clause in the Federal Meat Inspection Act; this case involves the livers of force-fed ducks in spite of the identical preemption language in the PPIA. The Ninth Circuit's attempts to uphold an unconstitutional California statute based on a misplaced concern for animal welfare continue to defy this Court's precedents.

Second, the Ninth Circuit's opinion creates a split with the decisions of the Fifth and Sixth Circuits on the issue of whether Congress has preempted the field of poultry products ingredients. The split is consequential because Congress amended the PPIA in 1968 to grant exclusive authority to the Department of Agriculture (USDA) to prescribe the ingredients in USDA-approved poultry products to ensure national uniformity and protect the public from adulterated products that fail to include any valuable constituent. If what is good for the goose is

good for the gander, then this Court should grant review to prevent differing interpretations of the PPIA among the circuits.

Third, Congress's interest in national uniformity — and the threat that the Ninth Circuit's opinion poses to USDA's regulatory authority — further illustrates the broader national importance of this case. Petitioners' foie gras ducks are the proverbial canaries in the coal mine. If a State can ban *some* USDA-approved poultry products based on the way in which, or the "type" of animal from which, the primary ingredient was produced — as the Ninth Circuit has now held — then a State (or city) can simply ban *any* (or all) USDA-approved meat and poultry products. The result will be havoc for farmers and processors well beyond Petitioners here. Moreover, the Ninth Circuit's decision frustrates Congress's declared intention to have poultry products remain "an important source of the Nation's total supply of food" and to "prevent and eliminate burdens upon such commerce."

STATEMENT OF THE CASE

A. Federal Regulation of Poultry Product Ingredients.

1. All poultry products sold in commerce in the United States are subject to the federal Poultry Products Inspection Act. 21 U.S.C. § 451 *et seq*. The PPIA declares Congress's intent: "Poultry and poultry products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion moves in interstate or foreign commerce. . . . [R]egulation by the Secretary of Agriculture and cooperation by

the States . . . as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers." 21 U.S.C. § 451.

Section 452 of the PPIA declares "the policy of the Congress" to provide for the inspection of poultry products and to "otherwise regulate the processing and distribution of such articles as hereinafter prescribed to prevent the movement or sale in interstate or foreign commerce of, or the burdening of such commerce by, poultry products which are adulterated or misbranded." 21 U.S.C. § 452; 9 C.F.R. § 381.1(b)(viii). A poultry product is deemed "adulterated" if, *inter alia*, "any ***valuable constituent*** has been in whole or in part omitted or abstracted therefrom[.]" 21 U.S.C. § 453(g)(8) (emphasis added); 9 C.F.R. § 381.1(b). A poultry product is "misbranded" if, *inter alia*, "if it purports to be or is represented as a food for which a definition and standard of identity or composition has been prescribed by regulations of the Secretary [of Agriculture] under section 457 of this title unless," *inter alia*, "it conforms to such definition and standard." 21 U.S.C. § 453(h)(7)(A).

In other words, federal law governs what domestic or foreign poultry products may be sold in the U.S. and mandates that they include all "valuable constituents," contain all conforming "ingredients," and meet the "definition and standard of identity or compensation" established by USDA. The PPIA directs the Secretary of Agriculture to "promulgate such other rules and regulations as are necessary to carry out the provisions of this chapter." 21 U.S.C. § 463(b).

2. Under § 457 of the PPIA, the Secretary of Agriculture, "whenever he determines such action is necessary for the protection of the public, may prescribe … definitions and standards of identity or composition [f]or articles subject to this chapter[.]" 21 U.S.C. § 457(b)(2). Federal regulations further reflect that the Secretary of Agriculture has delegated to the Administrator of the Food Safety and Inspection Service (the "FSIS") within USDA "the responsibility for exercising the functions of the Secretary of Agriculture under various statutes." 9 C.F.R. §§ 300.2(a), 300.4(a).

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

3. Like it or not, foie gras is just another poultry product that, as approved by USDA, is certified for sale throughout the United States as wholesome and

unadulterated. It is uncontested in this case that foie gras is an "ingredient" in Petitioners' USDA-approved poultry products under the PPIA and the USDA's implementing regulations. *See, e.g.*, 9 C.F.R. § 381.118(b) (referring to poultry "giblets" as "ingredients of poultry products") and 9 C.F.R. § 381.1 (defining "giblets" as including the "liver").

Foie gras is federally-approved both as a "single-ingredient" USDA-approved poultry product, just like "chicken breast," 9 C.F.R. § 381.444, and as a primary ingredient in other USDA-approved poultry products ranging from "Pate of Duck Liver" to "Whole Duck Foie Gras." CA9.Dkt.14-2 at ER020-021. Pursuant to its congressional authority, USDA has prescribed definitions and standards of identity or composition in its Food Standards and Labeling Policy Book for no less than 14 poultry products containing foie gras. CA9.Dkt.14-2 at ER019-024. As evidenced in the record, the USDA requires "minimum duck liver or goose liver foie gras content" ranging from 50%, 85%, or 100% in these foie gras products. *Id*. at ER020-024.

These ingredient requirements were the result of negotiations between USDA and the French government in the 1970s, as reflected in USDA policy memos. *Id*. at ER023-024. Indeed, USDA defines the duck liver ingredient in foie gras products as "obtained exclusively from specially fed and fattened geese and ducks." *Id*. at ER020-021. The liver from these force fed ducks is the most valuable constituent in these poultry products, and the PPIA states that these products would be "adulterated" "if any valuable constituent has been in whole or in part omitted or abstracted therefrom." 21 U.S.C. § 453(g)(8); *see also* 9 C.F.R. 381.1(b).

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

Under USDA's interpretation of its own regulations, just as chicken breast from chickens raised without antibiotics is an "ingredient" in chicken nuggets, so too is duck liver from force-fed ducks an "ingredient" in foie gras products. *See* FSIS Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submission, 81 Fed. Reg. 68933 (Oct. 5, 2016). "For example, if an establishment making a breaded chicken breast patty nugget purchases chicken breast bearing a 'raised without antibiotics' claim, the establishment may carry the claim through to the label of the chicken breast patty nugget in which the chicken breast is used as an ingredient provided the claim is preceded by an appropriate statement, e.g., 'chicken raised without antibiotics'." *Id*.

4. The PPIA includes a preemption clause that provides that "ingredient requirements . . . in addition to, or different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any official establishment in accordance with the requirements

under this chapter." 21 U.S.C. 467e (emphasis added).

B. California's Poultry Liver Requirement.

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

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

Moreover, as the Ninth Circuit also previously held in this case, California does not ban *all* poultry products containing foie gras ingredients, since § 25982 prohibits a foie gras ingredient if it results from force-feeding but would allow foie gras as an ingredient if it could somehow be obtained from a non-force-fed bird. *Canards I*, 729 F.3d at 945 n. 4 (9th Cir. 2013). In other words, § 25982 imposes a requirement that USDA-approved poultry products containing foie gras may only be sold if the primary poultry ingredient was produced without force feeding.

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

C. Proceedings Below.

1. Petitioners include the leading producer of foie gras products in the United States as well as the leading producers in Canada. Petitioners' poultry animals are slaughtered under USDA inspection at official establishments. The livers removed from the animals' carcasses are then prepared under USDA-inspection at official establishments, where they are included as USDA-approved ingredients in poultry products that bear USDA's mark of wholesomeness — in fact, as noted above, as *required* ingredients in those products. App. 42a.

All of Petitioners' foie gras products — ranging from pâté to whole duck foie gras — include USDA's minimum required amounts of duck liver as their primary ingredient.

2. In the district court, following the appeal of their motion for a preliminary injunction,[1] Petitioners moved for summary judgment on their Supremacy Clause claim. They submitted multiple declarations

[1] On July 2, 2012, the first court day that § 25982 was in effect, Petitioners filed suit in the district court and then sought a preliminary injunction based on their dormant Commerce Clause claims. The district court denied Petitioners' motion, and the Ninth Circuit affirmed — with both courts noting that Petitioners had not moved on the basis of preemption. *Ass'n des Éleveurs*, 2012 WL 1284942 at *6, n. 3 (C.D. Cal. 2012); *Ass'n des Éleveurs,* 729 F.3d 937, 950 n. 8 (9th Cir. 2013). On petition for a writ of certiorari, this Court called for a response from California and relisted the petition before ultimately denying it. No. 13-1313.

explaining how every poultry product they produce that contains foie gras is prepared at an official establishment under USDA inspection. CA9.Dkt.31 at SER040, 047. They submitted the federal materials that specify the definitions and standards of identity and composition of foie gras products. They even submitted examples of their USDA label approvals with the actual ingredients panels on their products. *Id.* at 041, 043-045, 048, 051-056. Respondent did not submit any evidence in opposition.

On January 7, 2015, the district court granted Petitioners' motion for summary judgment. The district court stated the crux of the dispute as follows: "This issue boils down to one question: whether a sales ban on products containing a constituent that was produced in a particular manner is an 'ingredient requirement' under the PPIA." App. 28a. It noted the evidence showing how foie gras "from ***any*** [goose or duck] carcass" may constitute an ingredient in Petitioners' poultry products, and it followed this Court's teachings in *National Meat* in finding that "[i]t is undisputed that the PPIA and its implementing regulations do not impose any requirement that foie gras be made with liver from non-force-fed birds." App. 43a (emphasis added).

The district court further explained, "Plaintiffs' foie gras products may comply with all federal requirements but still violate § 25982 because their products contain a particular constituent — force-fed bird's liver. Accordingly, § 25982 imposes an ingredient requirement in addition to or different than the federal laws and regulations." App. 44a. The district court permanently enjoined California from enforcing section 25982. App. 50a.

3. Respondent appealed. In a published opinion discussed further below, the Ninth Circuit concluded that § 25982 does not impose an ingredient requirement on Petitioners' poultry products because, in that court's view, "Section 25982 does not require that foie gras be made with different animals, organs, or physical components. Nor does it require that foie gras consist of a certain percentage of bird liver." App. 15a.

The Ninth Circuit held further that the PPIA's "preemption clause regarding 'ingredient requirements' governs only the physical composition of poultry products. Nothing in the federal law or its implementing regulations limits a state's ability to regulate the types of poultry that may be sold for human consumption." App. 18a.

The Ninth Circuit denied rehearing en banc. App. 51-52. Over opposition from Respondent, the Ninth Circuit stayed issuance of its mandate pending this petition, CA9.Dkt.57, which maintains in effect the permanent injunction that Petitioners obtained from the district court.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Opinion on an Important Question of Federal Preemption Conflicts with This Court's Recent Teachings in *National Meat.*

The last time the Ninth Circuit tried to uphold a California law banning the sale of USDA-approved meat products on the ground that "states are free to decide which animals may be turned into meat," the reversal by this Supreme Court was unanimous and unequivocal: "We think not." *National Meat Ass'n v.*

Harris, 565 U.S. 452, 465 (2012). Yet the Ninth Circuit continues to defy this Court in holding that California may ban the sale of USDA-approved poultry products if the State disapproves of the way in which — or the type of animal from which — its primary ingredient was produced.

As an initial matter, the Ninth Circuit here gave the PPIA's preemption clause the narrowest of interpretations. But, in construing the corresponding provision in the Federal Meat Inspection Act in *National Meat*, this Court squarely held that the FMIA's preemption clause — which contains the identical language as that in the PPIA — "sweeps widely." *National Meat*, 565 U.S. at 459. The Ninth Circuit never bothered to mention this Court's clear instruction concerning the wide sweep of the preemption clause.[2]

The Ninth Circuit also relied on a "presumption against preemption," stating that "we assume that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose." App. 10a. But this Court has most recently reminded that, where, like here, a federal statute "contains an express preemption clause, we do not invoke any presumption against preemption but instead focus on the plain wording of the clause." *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (citations and quotations omitted).

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[2] As at least one other circuit has recognized and Respondent has never disputed, "The legislative history of the two Acts and subsequent amendments indicate a congressional intent to construe the PPIA and the FMIA consistently." *Kenney v. Glickman*, 96 F.3d 1118, 1124 (8th Cir. 1996).

Even more troubling is how, in contrast to the district court, the Ninth Circuit all but ignored this Court's direction in *National Meat*, blithely concluding that it "does not apply." App. 22a. But this Court made clear in *National Meat* that a court evaluating preemption should consider how a "sales ban instead functions as a command" to federally-regulated official establishments to accomplish indirectly what a State may not do directly. *National Meat*, 565 U.S. at 454. This is why the district court adopted a "functional approach" in its analysis. App. 47a. Yet the panel's opinion never even mentions this approach either, which led it to a result that defies not only this Court's instruction but also basic logic. Just as the California sales ban in *National Meat* improperly functioned to prohibit USDA-approved meat products made with pork from non-ambulatory pigs (which are approved for slaughter by USDA), so too does the California sales ban here improperly function to prohibit USDA-approved poultry products made with livers from force-fed ducks (which are approved as ingredients by USDA).

National Meat concerned a perhaps well-intentioned but constitutionally misguided California law that, like here, sought to regulate the sale of a USDA-approved meat or poultry product based on the way the animal was treated prior to slaughter. Like the Ninth Circuit says about force-fed ducks in this case, the court of appeals in *National Meat* accepted California's argument that it was merely removing some "***types***" of pigs (the nonambulatory ones) from the federally-regulated meat production process. Indeed, relying on the same inapposite cases involving horsemeat that the court of appeals did at its peril in *National Meat*, the Ninth Circuit

here says: "***Nothing*** in the federal law or its implementing regulations limits a state's ability to regulate the ***types*** of poultry that may be sold for human consumption." App. 18a (first emphasis added).

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

The district court correctly understood the application of *National Meat*: "Thus, if the nonambulatory pig sales ban is preempted by the FMIA then § 25982 should also be preempted by the analogous PPIA." App. 46a-47a. The district court correctly heeded this Court's holdings: "*National Meat* requires the Court, in deciding Plaintiffs' express preemption claim, to prevent California from circumventing the PPIA's preemption clause (or as *National Meat* said, from 'mak[ing] a mockery' of it) through creative drafting." App. 49a. Unfortunately, the Ninth Circuit's opinion simply flouts this Court's crucial teachings and now enables States to make a

mockery of the PPIA. And it undermines Congress's interest in the uniform, national market for USDA-approved poultry products that other circuits have upheld.

Just as it was incumbent on this Court to hold in *National Meat* that a State may not impose any conflicting requirements on *meat* products from animals slaughtered at a USDA-inspected slaughterhouse, this Court should take up this case to hold that a State may not impose any additional or different ingredient requirements on *poultry* products prepared at a USDA-inspected processing facility in accordance with USDA's ingredient requirements.

II. The Ninth Circuit's Opinion on Preemption of the Field of Poultry Product Ingredients Conflicts with Established Decisions of the Fifth and Sixth Circuits.

While the conflict with this Court's decision in *National Meat* alone warrants review, the Court should also grant this petition to resolve a simple split among the circuits. In a case about poultry product *ingredients*, the Ninth Circuit came to the conclusion that "Congress clearly did not intend to occupy the field of poultry products" and that § 25982 presented no obstacle to Congress's full objectives in enacting the PPIA. App. 25a.[3] Yet in each of the other two circuits that have examined the scope of PPIA preemption, the courts of appeal have not hesitated to recognize what this Court recently

[3] The district court had not opined on the issues of field or obstacle preemption, since it rightly found that the PPIA expressly preempted the California statute.

reaffirmed. The PPIA not only "sweeps widely" but also "prevents a State from imposing any additional or different — ***even if non-conflicting*** — requirements." *National Meat*, 565 U.S. at 459 (emphasis added). The Ninth Circuit's opinion, which curiously avoids any mention of Congress's objective of national uniformity, creates a direct conflict with these other circuits.

In *Armour & Co. v. Ball*, 468 F.2d 76, 86 (6th Cir. 1972), the Sixth Circuit took up a Michigan ban on sausage that included an animal's "liver cracklings" (among many others unusual parts). Like with Petitioners' duck livers here, federal regulations placed no restriction on these ingredients. *Id.* at 86. The Sixth Circuit cited the identical FMIA provisions as those in the PPIA and observed that one purpose of requiring preemptive adherence to the USDA's standards was that, "[w]ithout such standards it would be impossible to carry out the express congressional policy." *Id.* at 81. "The Federal Act itself ***manifests a congressional intent to prescribe uniform standards*** of identity and composition," and "***the congressional purpose*** to standardize identity and composition of meat food products ***would be defeated if states were free to require ingredients***, however wholesome, which are not within the Secretary's standards." *Id.* (emphasis added).

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

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

Armour & Co., 468 F.2d at 84 (emphasis added). The Ninth Circuit's ruling that Congress did not intend to preempt the field of poultry product ingredients is thus in direct conflict with this longstanding Sixth Circuit decision.

In addition, the Ninth Circuit's opinion runs counter to the Fifth Circuit's en banc opinion in *Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293 (5th Cir. 1994). While the court of appeals here again completely ignored Congress's objective of national uniformity for poultry products, the Fifth Circuit, sitting en banc, made clear that, through the PPIA, "Congress thus subjected all domestic poultry production sold in interstate commerce to a single, federal program with uniform standards." *Id*. at 295-96 (emphasis removed). As the Fifth Circuit explained, "***The PPIA created one uniform regulatory scheme for the national market***," and "the PPIA maintain[s] uniformity regarding the

interstate sale of domestic poultry products." *Id.* at 296 (emphasis added).

The Ninth Circuit's opinion here cannot be reconciled with these other circuit precedents. If it stands, then any State could impose its own requirements on the sale of a USDA-approved poultry product based on the provenance of its principal ingredient, and the resulting patchwork would destroy the very national uniformity that Congress sought to achieve in the PPIA.[4]

Over 100 years ago, in *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898) — a case that pre-dates the PPIA but remains binding to this day — this Court invalidated a state ban on the sale of another federally-approved product that was controversial at the time: oleomargarine. "If [C]ongress has affirmatively pronounced the article to be a proper subject of commerce, we should rightly be influenced by that declaration." *Id.* at 8. Congress had provided for federal inspection of oleomargarine, *id.* at 8-9, just as it has done for foie gras products through the PPIA here. This Court held, "[W]e yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated, and which in its pure state is healthful." *Id.* at 14.

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[4] Rather than confront these cases or the uncontradicted evidence in the record, the Ninth Circuit resorted to citing double-hearsay from a TED talk and an NPR story about geese in Spain. App. 17a. It also relied on two dubious and inapposite circuit cases involving horsemeat, *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir. 2007), and *Cavel Intern., Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007).

III. This Case Squarely Presents Issues of National Importance with Serious Consequences for USDA's Regulation of the Entire Meat and Poultry Industry.

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

The Ninth Circuit's self-described "logic" is as follows:

> "Force-fed" is not a physical component that we find in our poultry; it is a feeding technique that farmers use. The same logic applies to the difference between regular chicken and cage-free chicken. "Cage-free" is no more an "ingredient" than "force-fed."

App. 16a. No kidding — of course those terms are not ingredients; they're adjectives. But "regular" chicken *is* an approved ingredient in various poultry products under the PPIA (as would be "cage-free" chicken) — since USDA does not impose any additional requirement on "chicken," either as a single-ingredient poultry product or as an ingredient in other poultry products. Likewise, "regular" force-fed duck liver foie gras is an approved ingredient in

various poultry products under the PPIA — since USDA similarly does not impose any additional requirement on "foie gras," either as a single-ingredient poultry product or as an ingredient in other poultry products.

As this Court has emphasized, "Pre-emption is not a matter of semantics. A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636 (2013). Nor may a court of appeals. This is especially so where the Ninth Circuit here held that, the PPIA be damned, a State can dictate what types of poultry animal may be used as an ingredient "even if [the statute] results in the *total ban*" of that poultry product. App. 18a. (emphasis added).[5]

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[5] In *Rath Packing* Co. *v. Becker*, 530 F.2d 1295, 1312-13 (9th Cir. 1975), the Ninth Circuit considered the "central issue" of labeling preemption involving an identical preemption clause. While the court of appeals here never uttered the word "uniformity," the court in *Rath Packing* had explained that the same preemption language we find in the PPIA here "***clearly shows the intent of Congress to create a uniform national*** labeling [in that case] standard." *Id*. (emphasis added). Notably, this Court affirmed *Rath Packing*, holding that California's attempt to ascribe a "restrictive meaning" to the preemption clause — just like the Ninth Circuit's attempt here — "twists the language beyond the breaking point." *Jones v. Rath Packing Co.*, 430 U.S. 519, 532 (1977). Under the Ninth Circuit's precedential opinion, courts in nine States will now be required to uphold, for example, a vegan-inspired San Francisco ordinance banning the sale of any product made from the flesh of a meat or poultry animal that was fattened for the purpose of slaughter, notwithstanding that such a law would ban every USDA-approved meat and poultry product.

The Ninth Circuit's opinion ducks this point in a way that threatens Congress's full objectives of achieving "uniformity" of poultry products "throughout the Nation" and of "eliminating burdens upon such commerce." *See* 21 U.S.C. § 451. Under the "logic" of the court of appeals, a State would somehow not be imposing a requirement on the ingredients in USDA-approved poultry products by requiring that they be made only from the carcasses of "organic" or "pasture-raised" chickens. But this would allow any State to undermine Congress's full objectives in promulgating the PPIA, thus completely eviscerating the preemptive effect of the PPIA and "making the mockery" that this Court has already had to warn California and the Ninth Circuit against.

This case thus has far-reaching consequences for every poultry product within USDA's regulatory purview, as its holding allows any State (or any city, for that matter) to impose a total ban on any USDA-approved food product. States and cities in the Ninth Circuit could tomorrow follow California in restricting the ingredients in meat and poultry products — to the point of banning them altogether — thus frustrating USDA's essential role in fulfilling Congress's command "to prevent and eliminate burdens upon such commerce [and] to effectively regulate such commerce." 21 U.S.C. § 451. As Justice Sotomayor more recently put it, "The primary purpose of a food of any kind is to be eaten." Tr. of Arg. in No. 16-111, at 15:24-25.

* * *

This case presents an excellent vehicle to address the preemption issue at stake. It comes to the Court

on appeal from a final judgment and permanent injunction. In addition, while the district court found the California statute to be preempted under the PPIA's express preemption clause (and thus did not need to reach Petitioners' claims of field preemption and obstacle preemption), the Ninth Circuit opined on all three doctrines, which allows this Court to consider all aspects of the Supremacy Clause issue.

In *National Meat*, this Court called for the views of the Solicitor General at the petition stage, and USDA ultimately submitted an amicus brief on the merits stating: "The United States has a strong interest in the correct interpretation of the Act's express preemption provision, 21 U.S.C. 678, which ensures that FSIS can discharge its duties at federally regulated slaughterhouses free from unwarranted intrusion by state law." No. 10-224. Petitioners expect that, if asked by this Court, USDA would likewise have a strong interest in the identical preemption provision here, which ensures that FSIS can discharge its duties at every federally regulated establishment that at which poultry products are prepared "free from unwarranted intrusion by state law."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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