No. 17-1285

In the Supreme Court of the United States

ASSOCIATION DES ELEVEURS DE CANARDS ET D'OIES DU QUEBEC, ET AL., PETITIONERS

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Poultry Products Inspection Act (PPIA), Pub. L. No. 85-172, 71 Stat. 441 (21 U.S.C. 451 *et seq.*), establishes a federal regime "for the inspection of poultry and poultry products" and the "regulat[ion] of the processing and distribution of such articles * * * to prevent the movement or sale" of "adulterated or misbranded" products. 21 U.S.C. 452. The PPIA contains a preemption provision that prohibits States from imposing "[r]equirements within the scope of [the PPIA] with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under [the PPIA]"—except for certain "recordkeeping" and related requirements—as well as "[m]arking, labeling, packaging, or ingredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce)" that are "in addition to, or different than, those made under [the PPIA]." 21 U.S.C. 467e. Section 467e further provides that States may exercise "concurrent jurisdiction * * * over articles required to be inspected under [the PPIA]" to prevent the distribution of adulterated or misbranded articles that are "outside" an "official establishment," and may "mak[e] requirement[s] or tak[e] other action, consistent with [the PPIA], with respect to any other matters regulated under [the PPIA]." *Ibid.* California Health & Safety Code § 25982 (West 2010) prohibits 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." The question presented is as follows:

Whether the PPIA preempts California Health & Safety Code § 25982 (West 2010).

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Poultry Products Inspection Act (PPIA or Act), Pub. L. No. 85-172, 71 Stat. 441 (21 U.S.C. 451 *et seq.*), establishes a federal framework "for the inspection of poultry and poultry products" and the "regulat[ion of] the processing and distribution of such articles * * * to prevent the movement or sale" of "adulterated or misbranded" products. 21 U.S.C. 452. Congress enacted the PPIA in 1957 in response to an explosion in demand for poultry products and corresponding growth of the poultry-processing industry. 60 Fed.

Reg. 6774, 6775-6776 (Feb. 3, 1995). New technologies also had "made it difficult for consumers to check levels of fat, water, and other ingredients used as fillers" in poultry products. *Id.* at 6775. Congress determined that "[u]nwholesome and adulterated poultry products in the channels of interstate or foreign commerce" were "injurious to the public welfare" and "adversely affect[ed] the marketing of wholesome poultry products." PPIA § 2, 71 Stat. 441 (21 U.S.C. 451).

The PPIA's regime was modeled after the Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 *et seq.*, "one of the first Federal consumer protection measures." 60 Fed. Reg. at 6775. Enacted in 1906 in response to concerns about unsanitary conditions at meatpacking facilities, the FMIA established standards for slaughtering, processing, and inspecting meat products. *Id.* at 6775-6776. Like the FMIA, the PPIA requires that slaughterhouses be inspected, 21 U.S.C. 455; establishes sanitation and labeling standards, 21 U.S.C. 456, 457; and prohibits the sale of adulterated or misbranded poultry products, 21 U.S.C. 458. Congress authorized the Secretary of Agriculture to administer the PPIA in cooperation with state governments. 21 U.S.C. 454, 463(b). The Secretary has delegated that authority to the Food Safety and Inspection Service (FSIS) in the Department of Agriculture (USDA). 9 C.F.R. 300.2(a).

b. The PPIA imposes detailed requirements on the labeling of poultry products. When a poultry product leaves an "official establishment"—*i.e.*, a facility where inspection of slaughter or processing of products is required, 21 U.S.C. 453(p)—its container must bear a label providing certain information. 21 U.S.C. 453(h), 457(a); 9 C.F.R. 381.115. Poultry products that "are capable of use as human food," 21 U.S.C. 458(a)(2), but

that are not labeled in accordance with the Act and FSIS regulations are deemed "misbranded," 21 U.S.C. 453(h), and may not be sold in commerce. Product labels generally must be preapproved by FSIS, 9 C.F.R. 381.115, 412.1(a), and must display various information such as the product's ingredients, quantity of contents, and an official inspection mark. 21 U.S.C. 453(h)(5)-(12); 9 C.F.R. 381.116-381.126. A product also is misbranded, and thus may not be sold, "if its labeling is false or misleading in any particular." 21 U.S.C. 453(h)(1); see 21 U.S.C. 457(c); 9 C.F.R. 381.129-381.130. Thus, even as to matters the PPIA does not regulate—or information that labels are not required to contain, such as animal-raising practices—a product's label may not make claims that are untrue.

Every poultry product's label must include the product's name. 21 U.S.C. 453(h)(7) and (9); 9 C.F.R. 381.117(a). For many products, the name is the "common or usual name of the food, if any there be"—or, if no common name exists, "a truthful descriptive designation." 9 C.F.R. 381.117(a); see 21 U.S.C. 453(h)(9)(A). The PPIA authorizes the Secretary, however, to prescribe "definitions and standards of identity or composition" for particular products if "he determines such action is necessary for the protection of the public." 21 U.S.C. 457(b). Such definitions and standards of identity or composition promote uniformity and prevent the use of misleading labeling by establishing "the principal constituents of any poultry product with respect to which a specified name of the product or other labeling terminology may be used." 9 C.F.R. 381.155(a)(1). A product that "purports to be or is represented as" one for which FSIS has prescribed a definition and standard

of identity or composition must "conform[] to such definition and standard"—and its label must "bear[] the name of the food specified in the definition and standard" —or else the product is misbranded. 21 U.S.C. 453(h)(7).

FSIS has prescribed definitions and standards of identity or composition for some products in its regulations. See, *e.g.*, 9 C.F.R. 381.164 (defining "barbecued" poultry) (emphasis omitted). FSIS also has published a guidance document, *Food Standards and Labeling Policy Book*, by the Office of Policy, Program and Emp. Dev., USDA (Aug. 2005) (Policy Book),[1] that addresses many poultry products and is designed to help producers "prepare product labels that are truthful and not misleading." Policy Book 2. If a product's label bears a term from the Policy Book, and the product complies with the Policy Book's definition, the label may be treated as "generically approved" without specific FSIS preapproval, so long as the label includes all other required labeling features. 9 C.F.R. 412.2(a)(1) and (b). For example, the Policy Book states that a product labeled "Chicken Patty Fritter" must contain at least 35% chicken patty, and a product may be labeled "Italian style" only if it contains anise, fennel, certain "Italian type cheese[s]," or at least three of basil, garlic, marjoram, olive oil, and oregano. Policy Book 57, 75 (capitalization omitted).

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[1] https://www.fsis.usda.gov/wps/wcm/connect/7c48be3e-e516-4ccf-a2d5-b95a128f04ae/Labeling-Policy-Book.pdf?MOD=AJPERES. The Policy Book, which is published electronically on FSIS's website, is not internally paginated; page numbers used herein refer to the page number in the electronic file.

This case involves foie gras products. The Policy Book's entry entitled "Foie Gras Products, Duck Liver, And/Or Goose Liver," states that foie gras is "obtained exclusively from specially fed and fattened geese and ducks." Policy Book 53 (capitalization omitted). It further states that "[p]roducts in which foie gras is used are classified" into three groups "based on the minimum duck liver or goose liver foie gras content." *Ibid.* If a product contains at least 50% foie gras, it may be called a "Pate," "Galantine," or "Puree" of goose or duck liver. *Id.* at 54. If the product has at least 85% foie gras, it may be named "Goose Foie Gras," "Duck Foie Gras," or a "Block" or "Parfait" thereof. *Ibid.* And a product in which the only animal tissue is foie gras may be named "Whole Goose Foie Gras" or "Whole Duck Foie Gras." *Ibid.* These standards largely follow French foie gras regulations and standards.[2] The label need not translate the term "foie gras," but it must always indicate in English the kinds of poultry liver in the product. *Id.* at 55.

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[2] See Robert G. Hibbert, Dir., Standards and Labeling Div., MPITS, Standards and Labeling Requirements for Duck Liver and/or Goose Liver "Foie Gras" Products 1-2 (Sept. 21, 1984), *reprinted in FSIS Policy Memoranda*, https://www.fsis.usda.gov/wps/wcm/connect/92485d36-be7f-451b-9153-7a921b13dc72/Policy_Memos_101818.pdf?MOD=AJPERES. As USDA staff explained in 1984, "[i]n 1975, representatives of the French government petitioned the USDA to adopt the French standards for foie gras products," and "[a]n agreement was reached between our respective governments to follow these standards pending a rulemaking procedure." *Id.* at 2. The anticipated rulemaking "was not finalized," but "over the years the French standards were followed and applied to foie gras products." *Ibid.* In 1980, "the French government and trade associations revised" their standards and "requested [USDA's] renewal and approval of the new regulations." *Ibid.* USDA "decided to follow these requirements with some modifications," finding that their use "w[ould] eliminate confusion and provide a descriptive classification for these products." *Ibid.*

c. In 1968, Congress amended the PPIA "to provide for cooperation with appropriate State agencies with respect to State poultry products inspection programs." Wholesome Poultry Products Act (WPPA), Pub. L. No. 90-492, 82 Stat. 791. The WPPA also added a preemption provision to the PPIA, WPPA § 17, 82 Stat. 807 (21 U.S.C. 467e), which consists of three sentences.

The first sentence of Section 467e prohibits a State from imposing "[r]equirements within the scope of [Chapter 10 of Title 21, *i.e.*, the PPIA] with respect to premises, facilities and operations of any official establishment, which are in addition to, or different than those made under [the PPIA]." 21 U.S.C. 467e. The second sentence, at issue here, then states:

> Marking, labeling, packaging, or ingredient 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 [the PPIA] may not be imposed by any State * * * with respect to articles prepared at any official establishment in accordance with the requirements under [the PPIA].

Ibid. The second sentence further provides that States "may, consistent with the requirements under [the PPIA,] exercise concurrent jurisdiction with [USDA] over articles required to be inspected under [the PPIA] for the purpose of preventing the distribution for human food purposes of * * * adulterated or misbranded" foods that are "outside" an official establishment (or, for imported products, "after their entry into the United States"). *Ibid.* Section 467e's third sentence states that "[the PPIA] shall not preclude any State * * * from making requirement or taking other action, consistent

with [the PPIA], with respect to any other matters regulated under [the PPIA]." *Ibid.*

2. In 2004, California enacted 2004 Cal. Stat. 6993-6994 (Cal. Health & Safety Code § 25980 *et seq.* (West 2010)), which forbids persons in California from "force feed[ing] a bird for the purpose of enlarging the bird's liver beyond normal size." Cal. Health & Safety Code § 25981 (West 2010). Another provision of that law, at issue here, prohibits the sale in California of a product "if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." *Id.* § 25982. "Force feeding" is defined as "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." *Id.* § 25980(b). A person who violates the law is subject to a civil fine of $1000 per violation and criminal prosecution. *Id.* § 25983.[3]

California's law took effect on July 1, 2012. Cal. Health & Safety Code § 25984(a) (West 2010). Petitioners filed this suit against respondent and others alleging that Section 25982 violates the dormant Commerce Clause and is unconstitutionally vague. Pet. App. 8a, 30a. They sought a preliminary injunction against enforcement of Section 25982. 2012 WL 12842942, at *2. The district court denied the request for an injunction,

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[3] In an earlier phase of this litigation, the court of appeals accepted California's position that Section 25982 does not apply to down jackets and other products that come from a force-fed bird but are not "produced by force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." 729 F.3d 945; see *id.* at 944-946. Petitioners do not appear to dispute that interpretation in this Court.

concluding that petitioners had not shown a likelihood of success on either of those claims. *Id.* at *5-*10. The court of appeals affirmed, 729 F.3d 937, and this Court denied certiorari, 135 S. Ct. 398.

3. a. Petitioners filed an amended complaint alleging that Section 25982 is preempted by the PPIA and sought summary judgment on that basis.[4] Pet. App. 8a, 31a. The district court granted summary judgment for petitioners, concluding that Section 25982 is expressly preempted because it "imposes an ingredient requirement in addition to or different than the federal laws and regulations" impose. *Id.* at 44a; see *id.* at 40a-49a. The court reasoned that "[petitioners'] 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." *Id.* at 44a. The court "assume[d], but d[id] not decide, that foie gras may be produced without force feeding birds to enlarge their livers." *Id.* at 43a n.8. The court did not address petitioners' alternative contention that the PPIA occupies the entire field of poultry-product ingredients. *Id.* at 49a n.12; cf. D. Ct. Doc. 118, at 20-25 (May 15, 2014).

b. The court of appeals reversed. Pet. App. 1a-26a. The court first held that the PPIA does not expressly preempt Section 25982. *Id.* at 9a-23a. It began by stating that it would "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

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[4] Petitioners did not seek summary judgment on their claim that Section 25982 violates the dormant Commerce Clause, see D. Ct. Doc. 118 (May 15, 2014), and the decisions below did not address it. This brief accordingly does not address that claim, or any claim concerning any other, more recent enactments by California.

of Congress,'" and that, in this "field traditionally regulated by the states, compelling evidence of an intention to preempt is required." *Id.* at 10a (quoting *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)). The court concluded that "[S]ection 25982 is not expressly preempted" because it does not impose an "ingredient requirement" in addition to or different than the PPIA. *Id.* at 11a.

The court of appeals noted that "the PPIA does not define the term 'ingredient,'" and it determined based on dictionary definitions and other PPIA provisions that "'ingredient' as used in the PPIA is most naturally read as a physical component of a poultry product." Pet. App. 11a-12a. The court observed that "the PPIA's 'ingredient requirements' address the physical components of poultry products, not the way the animals are raised." *Id.* at 13a; see *id.* at 13a-15a. It then determined that Section 25982 does not impose an ingredient requirement because it "does not require that foie gras be made with different animals, organs, or physical components" or "consist of a certain percentage of bird liver." *Id.* at 15a; see *id.* at 15a-23a. Rather, the court stated Section 25982 governs "how animals are treated long before they reach the slaughterhouse gates," and a difference in "the treatment of the birds *while alive* * * * is not a physical component that we find in our poultry." *Id.* at 16a.

The court of appeals rejected petitioners' contention that "[S]ection 25982 is functionally a ban on *all* foie gras" because it "bans the *process* by which it is made," explaining that "nothing in the record * * * shows that force-feeding is *required* to produce foie gras." Pet. App. 17a. It noted that the district court had "assumed, without deciding, that alternative methods of producing

foie gras are available," and petitioners "d[id] not appear to dispute that alternative methods" exist. *Id.* at 17a & n.5. The court of appeals further stated that, "even if [S]ection 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," because "[t]he PPIA targets the slaughtering, processing, and distribution of poultry products" but "does not mandate that particular types of poultry be produced for people to eat." *Id.* at 18a.

The court of appeals also rejected petitioners' alternative arguments that Section 25982 is preempted under field-preemption and obstacle-preemption principles. Pet. App. 23a-26a. It stated that petitioners' "field preemption argument ignores the states' role in poultry regulation," which Section 467e itself preserves, and petitioners also had not shown how Section 25982 "stands as an obstacle to the PPIA's objectives." *Id.* at 24a-25a (citing 21 U.S.C. 451).

DISCUSSION

The court of appeals correctly determined that the PPIA does not expressly or impliedly preempt Section 25982. Neither determination conflicts with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly determined, on the present record, that the PPIA does not expressly preempt Section 25982.

a. The second sentence of the PPIA's preemption provision, on which petitioners rely (Pet. 3), prohibits a State from imposing "[m]arking, labeling, packaging, or ingredient requirements" that "are in addition to, or different than those made under [the PPIA]." 21 U.S.C. 467e. There is no contention that the California law at

issue, Section 25982, imposes any preempted marking, labeling, or packing requirements. Indeed, the PPIA does not regulate the treatment of farm animals at all, and it does not require product labels to disclose such practices unless the omission of the information would render the label "false or misleading," 21 U.S.C. 453(h)(1). See 70 Fed. Reg. 56,624, 56,624 (Sept. 28, 2005) ("[T]here is no specific federal humane handling and slaughter statute for poultry.").

Petitioners contend, however, that Section 25982's prohibition on the sale of liver from force-fed poultry imposes an "ingredient requirement." Pet. 3 (citation omitted). The PPIA does not define that term, so those words carry their ordinary meanings. See *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 454 (2012). In ordinary usage, an "ingredient" is a physical or chemical component of a composite thing. See *Webster's New International Dictionary* 1278 (2d ed. 1960) (*Webster's Second*) ("That which enters into a compound, or is a component part of any combination or mixture; a constituent."); Pet. App. 12a (collecting dictionary definitions). A "requirement" is "[a] requisite or essential condition" or "a required quality." *Webster's Second* 2117. An "ingredient requirement" therefore naturally refers to a requisite or essential physical or chemical component of a poultry product.

The vast majority of ingredient requirements imposed by the PPIA, FSIS's regulations, and the Policy Book pertain to the components that must (or must not) be contained in products that are sold under a particular name. The PPIA's labeling requirements ensure that every poultry product is labeled with its name and ingredients, 9 C.F.R. 381.117-381.118, and a product carrying a name for which FSIS has prescribed a definition

and standard of identity or composition (or that otherwise "purports to be or is represented as" such a product) must conform to the specified standards. 21 U.S.C. 453(h)(7); see 9 C.F.R. 381.117(a), 412.2; see also 9 C.F.R. 381.156-381.174; Policy Book 7-187. For example, a product labeled "[chicken] barbecued" must "consist[] of ready-to-cook" chicken "that has been cooked in dry heat and basted with a seasoned sauce." 9 C.F.R. 381.164 (emphasis omitted). A product sold as "'Turkey Ham'" must (*inter alia*) "be fabricated from boneless, turkey thigh meat with skin and the surface fat attached to the skin removed" and must be cured with an approved curing agent. 9 C.F.R. 381.171(a).

A small number of requirements permit or prohibit specific ingredients generally, but they likewise concern the physical composition of a poultry product. For example, the Act deems a poultry product "adulterated" if (*inter alia*) it contains certain "food additive[s]" that are deemed "unsafe" under other provisions of federal law; "if it is, in whole or in part, the product of any poultry which has died otherwise than by slaughter"; or "if any substance has been added * * * so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is." 21 U.S.C. 453(g)(2)(C), (D), (5), and (8). FSIS's regulations also generally allow use of binders and antimicrobial agents that have been found safe by the Food and Drug Administration and FSIS and that are otherwise permitted. 9 C.F.R. 381.155(b).

A state law that imposed requirements regarding the physical or chemical components (or amounts of them) that a poultry product may or must contain that are different than or in addition to the federal standards would be preempted by Section 467e. For example, if a Texas or

North Carolina law required products labeled "[chicken] barbecued," 9 C.F.R. 381.164 (emphasis omitted), to be basted with a particular *type* of seasoned sauce, it would be preempted. Likewise, if a California law required products labeled "pate of goose liver" to contain a higher percentage of goose-liver foie gras than the FSIS's Policy Book (which only requires 50%), it would be preempted. Policy Book 54. Cf. *Armour & Co* v. *Ball*, 468 F.2d 76, 82 (6th Cir. 1972) (holding FMIA's nearly identical preemption provision preempted state law imposing different and additional requirements than FSIS standards for a "sausage"), cert. denied, 411 U.S. 981 (1973).

Section 25982, however, does not address the permitted or required physical and chemical components of poultry products. Section 25982 provides that "[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 (West 2010). It restricts the sale of certain poultry products based solely on the method used to produce them, not the composition of a final product.

b. Petitioners contend (Pet. 14) that Section 25982 "function[s] to prohibit" a poultry-product ingredient—foie gras—that the PPIA does not bar. They similarly argued below that Section 25982 would operate to ban foie gras "because it bans the *process* by which it is made." Pet. App. 17a.

This case, however, does not present that question. As the court of appeals explained, an essential factual premise of petitioners' argument—that Section 25982 operates to forbid the sale of all foie gras, or of a type of foie gras that is a materially distinct substance, physically or chemically—has not been established. Pet.

App. 17a-18a. The court determined that "nothing in the record * * * shows that force-feeding is *required* to produce foie gras." *Id.* at 17a. Indeed, the district court had assumed arguendo that other methods of producing foie gras without force-feeding *do* exist, *id.* at 17a, 43a n.8, and on appeal, petitioners "d[id] not appear to dispute" that assumption, *id.* at 17a n.5. Petitioner also "d[id] not claim that foie gras produced from non-force-fed birds is in any way inferior to foie gras made from the livers of force-fed birds." *Id.* at 11a. And in this Court, petitioners have not identified any record evidence addressing the issue, much less demonstrated that the district court's assumption was incorrect.

Without that factual premise, petitioners' argument that Section 25982 functions to ban an ingredient cannot succeed: If foie gras can be produced in a manner that does not entail the force-feeding prohibited by Section 25982, that provision cannot be said to impose any requirement on the physical or chemical components that a finished poultry product may contain, let alone one that is different than or in addition to those made under the PPIA. And because that critical premise has not been established in this case, the court of appeals correctly concluded that petitioners were not entitled to summary judgment on this theory. Cf. *National Meat Ass'n* v. *Harris*, 565 U.S. 452, 462-463 (2012) (rejecting argument that state law operated in a way that rendered it preempted, because the argument's "preliminary steps ha[d] no foundation in the record"). At a minimum, the gap on this central factual issue would make this case a poor vehicle for addressing petitioners' argument.

c. If in fact Section 25982 did operate to make unavailable in the State any poultry products containing

foie gras—or perhaps a particular type of foie gras that was a materially distinct substance, physically or chemically—it would present a more difficult question. On the one hand, in *National Meat*, this Court held that a California law regulating commercial sales of certain meat products was preempted by a portion of the FMIA's preemption provision concerning slaughterhouses, 21 U.S.C. 678, which is nearly identical to a parallel provision in Section 467e, because the law's inevitable effect was to require slaughterhouses to restructure their operations. *National Meat*, 565 U.S. at 464. Similarly here, a state law that prohibited the only extant methods for producing products containing certain ingredients may be preempted by the PPIA. On the other hand, the Court has construed preemption provisions in some other statutes as displacing only state-law requirements that address a subject matter covered by that statute and implementing regulations, or that have a specific federal counterpart. See, *e.g.*, *Mid-Con Freight Sys., Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 440, 447 (2005); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 500 (1996). Thus, Section 467e which, as explained above, does not preempt state regulation of farming practices, might similarly be read to preempt only state laws that impose requirements on matters covered by the PPIA and implementing USDA regulations, and not regulation with respect to matters that neither the PPIA nor USDA regulations address.

There is, however, no occasion in this case to resolve the difficult question whether a statute like Section 25982 would be preempted if, as applied, it operated to ban a particular substance in a poultry product. For as explained above, petitioners have not established the factual predicate for such a claim because they have not

established that liver for foie gras cannot be produced by a method other than force-feeding the geese or ducks.

d. Petitioners' remaining arguments concerning express preemption lack merit. Petitioners principally contend (Pet. 12-16) that the decision below is inconsistent with *National Meat*. That is incorrect. Although *National Meat* involved the FMIA's nearly identical preemption provision, 21 U.S.C. 678, it concerned a different portion of that provision, not at issue here, that preempts state-law requirements "with respect to premises, facilities and operations of any establishment at which inspection is provided" that "are in addition to, or different than those made under [the FMIA]." See *National Meat*, 565 U.S. at 458-468. The Court held that a California statute was preempted because it imposed different requirements than the FMIA with respect to those subjects. For example, the FMIA permitts slaughterhouses to hold nonambulatory pigs, while the California law required slaughterhouses to euthanize them. *Id.* at 460. The Court did not address the FMIA's distinct provision preempting state-law "ingredient requirements" that are "in addition to, or different, than those made under" the FMIA. 21 U.S.C. 678.

Petitioners emphasize (Pet. 12, 15) that *National Meat* rejected an argument that California's law survived preemption because the FMIA did not address, and thus "states are free to decide[,] which animals may be turned into meat." 565 U.S. at 465 (citation omitted). But the Court rejected that argument because its premise —that the FMIA does not address which animals may be slaughtered at a federally regulated facility that produces meat for human consumption—was mistaken. As the Court explained, the FMIA *does* address that issue.

Ibid. ("[O]ne vital function of the Act and its regulations is to ensure that some kinds of livestock delivered to a slaughterhouse's gates will *not* be turned into meat."). Petitioners also stress (Pet. 13, 17) the Court's observation that the FMIA's preemption provision "sweeps widely." *National Meat*, 565 U.S. at 459. But that description referred to the fact that the FMIA's preemption provision applies to any "additional or different" requirement that state law imposes with respect to the subjects the provision enumerates, "even if non-conflicting." *Id.* at 459-460. Section 25982 is not preempted by the PPIA because petitioners have not shown that it imposes a requirement on the subjects Section 467e enumerates.

Petitioners also argue (Pet. 4, 6-7, 14, 19-20, 22) that Section 25982 is preempted because liver from force-fed ducks or geese is "approved" by USDA, citing the Policy Book's entry on foie gras products. That is incorrect. As explained above, that guidance document addresses only the names that may be used in labeling to describe various foie gras products. See p. 5, *supra*. It does not embody any USDA determination about which foie gras products are permissible.

Petitioners additionally contend (Pet. 16) that a federal "interest in the uniform, national market" in poultry products supports construing Section 467e broadly to preempt Section 25982. See, *e.g.*, Republic of France Amicus Br. 12-16; Reason Found. & Cato Amicus Br. 13-14. "[A]ssur[ing] uniformity in the regulation of products shipped in interstate, intrastate, and foreign commerce" was one of the goals of the WPPA, which added the PPIA's preemption provision, 60 Fed. Reg. at 6776 —particularly uniformity in "inspection standards," 21 U.S.C. 452, and labeling, see, *e.g.*, H.R. Rep. No.

1333, 90th Cong., 2d Sess. 3 (1968). And within its scope, Section 467e does ensure uniformity. But that uniformity objective is not implicated here because feeding and other farming practices fall outside Section 467e's scope.[5]

2. The court of appeals correctly rejected petitioners' alternative field-preemption and obstacle-preemption claims. Pet. App. 23a-26a. As the court explained, the PPIA cannot fairly be characterized as preempting the entire field of regulation of poultry-product ingredients because the PPIA reserves a significant role for state law in this area. *Id.* at 24a-25a. This Court has held that express preemption provisions worded similarly to

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[5] Petitioners contend (Pet. 13) that in addressing the scope of Section 467e, the court of appeals erred in "assum[ing] 'that the historic police powers of the States were not to be superseded by the Federal Acts unless that was the clear and manifest purpose of Congress.'" Pet. App. 10a (quoting *Medtronic, Inc.*, 518 U.S. at 485). Petitioners notes (Pet. 13) that this Court stated in *Puerto Rico* v. *Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016), that because the statute there "'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'") (citation omitted).

The single sentence in the court of appeals' opinion quoted above furnishes no basis for review by this Court. There is no indication that it materially affected the court of appeals' analysis. Indeed, the court elsewhere stated that its conclusion was "[b]ased on the ordinary meaning of 'ingredient' and the plain language and purpose of the PPIA." Pet. App. 11a. And, as discussed above, the ultimate conclusion that Section 25982 is not preempted is correct without regard to any presumption.

Section 467e do not preempt state laws that impose requirements that are identical to—not "in addition to, or different than"—those under federal law. 21 U.S.C. 467e; see, e.g., *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 330 (2008); *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 446-447 (2005). Here, moreover, Section 467e expressly preserves States' ability to "exercise concurrent jurisdiction" over adulterated or misbranded poultry products once they have left an "official establishment" (or for imported goods, after they enter this country). 21 U.S.C. 467e. And it disclaims preempting state laws that regulate matters other than the subjects Section 467e enumerates. *Ibid.*; see *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 613 (1991) (rejecting field-preemption argument where federal statute expressly preempted only state laws on particular issues and "le[ft] ample room for States and localities to supplement federal efforts").

Petitioners' obstacle-preemption argument similarly lacks merit. See Pet. App. 25a-26a. Section 25982 prohibits a "feeding practice that occurs far away from the official establishments that the PPIA regulates." *Id.* at 26a. It poses no obstacle to achieving the PPIA's objectives of ensuring that "poultry products are 'wholesome, not adulterated, and properly marked, labeled, and packaged.'" *Id.* at 25a (quoting 21 U.S.C. 451).

3. Petitioners do not contend that any court of appeals has reached a contrary conclusion under the PPIA in considering a state law that addresses animal-feeding practices. They argue instead that the Ninth Circuit's reasoning is inconsistent with two decisions under the FMIA. Pet. 17-19 (discussing *Armour*, *supra*, and *Mississippi Poultry Ass'n* v. *Madigan*, 31 F.3d 293 (5th Cir. 1994) (en banc)). Those cases are inapposite.

In *Armour*, the Sixth Circuit held that the FMIA preempted a Michigan law that banned the sale of sausage unless it met a carefully elaborated definition. 468 F.2d at 79, 81-82. "[T]o be legally saleable in Michigan," sausage could "consist only of" certain enumerated animal parts; could not contain poultry products, fatty tissue, or certain binders; and must contain at least 12% protein. *Id.* at 81; see *id.* at 83. The court held that those limitations constituted "ingredient requirements" and thus were preempted by the FMIA. *Id.* at 81. Indeed, Michigan's definition "conflict[ed] in many material instances" with "definitions and standards of identity or composition" for sausage established by federal regulations. *Ibid.* California's law, in contrast, does not impose such ingredient requirements.

Mississippi Poultry involved a USDA regulation permitting the sale in interstate commerce of imported poultry products that had been inspected under different standards abroad, "as long as the foreign standards are determined by the Secretary to be 'at least equal to' the federal standards" for domestic products. 31 F.3d at 295. The en banc Fifth Circuit held that regulation invalid, but it did not address the scope of "ingredient requirements" in the PPIA's preemption provision. *Id.* at 298-310. Petitioner cites the court's description of the PPIA as establishing "one uniform regulatory scheme for the national market" in poultry products and other similar statements. Pet. 18 (quoting *Mississippi Poultry*, 31 F.3d at 296) (emphasis omitted). But those general statements do not reflect a determination that the PPIA's regulatory scheme encompasses feeding and other farming practices.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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