No. 13-1313

In The
Supreme Court of the United States

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC, *et al.*,

Petitioners,

v.

KAMALA D. HARRIS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF NEBRASKA, ET AL. IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The Ninth Circuit's decision – permitting California to ban USDA-approved poultry products from other states based solely on their method of production – poses a significant threat to the sovereign interests of *Amici* States. The Ninth Circuit's holding authorizes states to contravene the long-standing limitations on the regulation of interstate commerce whenever the legislature of one state disapproves of a production method used by farmers in other states – even if those farmers raise their animals and turn them into food *entirely* in other states. *Amici* States submit this brief in support of the challenge to California's "Force Fed Birds" statute, Cal. Health & Safety Code § 25982, because the issue presented by the petition for certiorari is of exceptional importance to the preservation of state sovereignty.

Amici States are concerned with the impact of the Ninth Circuit's decision on the economies of all states that produce agricultural products from animals as well as on the broader trade relationships among the states.[2] If permitted to stand, the decision

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[1] In accordance with Rule 37 of the Supreme Court's Rules of Practice and Procedure, counsel for *Amici* States provided notice to counsel of record of the intention to file this *amicus curiae* brief in support of Petitioners.

[2] While limited, if any, foie gras is produced in *Amici* States, *Amici* States have agricultural economies valued in the billions of dollars. If allowed to stand, the Ninth's Circuit decision could place these and other valuable industries in jeopardy.

allows the states to engage in economic isolationism, set themselves against one another, and balkanize the nation, thus giving rise to trade wars and undoing the protections of the Court's dormant Commerce Clause jurisprudence and the structural limitations on extraterritorial regulation inherent in the Constitution.

INTRODUCTION

The issue underlying the petition for certiorari is of exceptional importance to state sovereignty because the Ninth Circuit's decision discards the analytical framework long applied by the federal courts to determine whether state laws run afoul of the dormant Commerce Clause. Generally, the strictures imposed by the dormant Commerce Clause prohibit states from regulating commercial activity occurring wholly beyond their borders.

But § 25982 goes far beyond regulating the feeding of ducks in California. As applied to products of poultry animals from outside California, it regulates activity occurring wholly out of state, i.e., the methods farmers use in other states to produce their poultry products. This infirmity constitutes grounds for striking down § 25982. Nevertheless, the Ninth Circuit upheld the ban based solely on California's perception about the welfare of farm animals in *other* states.

Amici States urge the Court to grant certiorari. The implications of the Ninth Circuit's reasoning should be troubling to all states. If left unturned, the decision will allow any state to altogether prohibit the sale of goods in interstate commerce whose method of production it disfavors, even though the production takes place entirely in other states.

ARGUMENT

The Court of Appeals' decision conflicts with the dormant Commerce Clause's limitations on state laws regulating interstate commerce. The Commerce Clause provides:

> The Congress shall have the power . . . [t]o regulate Commerce with foreign nations, and among the several States. . . .

U.S. Const. art. I, sec. 8, cl. 3.

Thus, the power to regulate interstate commerce belongs to the federal government.

The "Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Institute,* 491 U.S. 324, 336 (1989). And "any attempt to directly assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977).

This structure reflects the vision of the Framers: that "every farmer . . . shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). Free access to markets is denied when a state prohibits the sale of an agricultural product based solely on the production method an out-of-state farmer employs. "When a state statute directly regulates or discriminates against interstate commerce, . . . we have generally struck down the statute without further inquiry." *Brown-Foreman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). The Ninth Circuit's decision conflicts with the long-standing precedent prohibiting the application of state law to wholly extraterritorial commercial activity.

This infirmity gives rise to practical implications concerning sovereignty that are of exceptional importance to *Amici* States.

I. THE NINTH CIRCUIT'S DECISION TO UPHOLD A LAW THAT REGULATES WHOLLY EXTRATERRITORIAL COMMERCIAL ACTIVITY CONFLICTS WITH THE PRECEDENTS OF THIS COURT AND OF OTHER FEDERAL CIRCUITS.

This case involves a challenge to California's Health and Safety Code, §§ 25980-25984, which prohibit the sale of animal products in California, namely foie gras, if the product was the "result of force feeding a bird for the purpose of enlarging the

bird's liver beyond normal size." Cal. Health & Safety Code § 25982.

Without commenting on the wisdom of this prohibition, *Amici* States do not question California's exercise of its police power over the treatment of livestock *within its borders*. *Amici* States would likewise not want any other state to dictate livestock production methods of *Amici* States' livestock producers. A state's power to protect its own flora and fauna is a matter of that state's sovereignty.

But *Amici* States take exception to the application of § 25982 to products from poultry animals raised entirely *outside* California. To the extent § 25982 bans the sale of agricultural products produced entirely *outside California* such a ban is unconstitutional.

The Ninth Circuit committed a critical error in upholding California's extraterritorial overreach which calls out for this Court's review. In upholding the California ban, which is based solely on the USDA-approved production method utilized across the nation, the Ninth Circuit has allowed California to isolate its market from the rest of the nation in the very way that the Commerce Clause disallows.

The Ninth Circuit based its reasoning on the notion that "California's standards are therefore not imposed as the *sole* production method Plaintiffs must follow." *Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 950 (9th Cir. 2013). In other words, out-of-state livestock

producers are not denied access to the largest economic market in the country, so long as they substantially modify their animal husbandry practices to those not disfavored by the California Legislature.

This reasoning conflicts with the precedent of this Court and the other Circuits.[3] States may not "attach restrictions to exports or imports in order to control commerce in other States," because doing so "would extend the [State's] police power beyond its jurisdictional bounds." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 393 (1994).

As interpreted and blessed by the Ninth Circuit, § 25982 regulates agricultural production activities wholly outside California. In fact, the California Legislature acknowledged when it passed the law in 2004 that it was "the express intention of the Legislature . . . for persons or entities engaged in agricultural practices that include raising and selling force fed birds *to modify their business practices*." Cal. Health & Safety Code § 25984(c) (emphasis added). But the dormant Commerce Clause makes clear that California cannot regulate livestock production practices of out-of-state farmers. Because the Ninth Circuit's

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[3] *See, e.g., National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151 (7th Cir. 1999) (per curiam) (*Meyer II*); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995) (*Meyer I*); *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980).

extraterritoriality analysis conflicts with the precedent of this Court and other Circuits, certiorari should be granted.

II. THE NINTH CIRCUIT'S DECISION GIVES RISE TO PRACTICAL IMPLICATIONS REGARDING STATE SOVEREIGNTY THAT ARE OF EXCEPTIONAL NATIONAL IMPORTANCE.

The Ninth Circuit's decision also has significant implications for interstate commerce that are of exceptional national importance. The decision opens the door to all states to enact laws to further their individual policy goals at the expense of the free flow of trade throughout the Union.

A. The Implications for Agricultural Production.

The effect of the Ninth Circuit's decision is to green-light all similar forms of extraterritorial regulation of agricultural production in other states. Such a holding will have a profound impact on food production in this country.

Indeed, the Ninth Circuit's decision is already being cited in support of barriers to free trade in agricultural products among the states. For example, starting in 2015, California will ban the sale of eggs from out-of-state hens that are not housed in cages at least as large as California dictates for its own hens. In its motion to dismiss a lawsuit by the state of

Missouri – in which other *Amici* States have joined as plaintiffs – challenging that law as an impermissible extraterritorial regulation, California cites the Ninth Circuit's decision in this case *passim*. (*Missouri v. Harris*, U.S. Dist. Ct. E.D. Cal. Case No. 2:14-cv-00341-KJM-KJN at ECF Dkt. No. 36, p. ii [Table of Authorities].)

Whether the law regulates foie gras or eggs, the dormant Commerce Clause precludes California from forcing its views of animal welfare on farmers in other sovereign states. Here, the California statute explicitly seeks to "modify" out-of-state farmers' "agricultural practices" based on California's own views of livestock production. This effort seeks to undo the free choices of citizens of other states without providing those citizens any democratic recourse against California. And California has no legitimate interest in regulating these out-of-state farming methods.

All poultry products that circulate in interstate commerce are inspected and certified by the United States Department of Agriculture, and there is thus no health or safety concern based on foie gras production methods to anyone living in California. Moreover, because application of § 25982 to out-of-state farmers by definition affects only animals that are raised outside the state, the only practical effect of the statute is to dictate how livestock are fed in other

states – which is not within California's police power to decide.[4]

B. The Implications Beyond Agricultural Production.

The implications of the Ninth Circuit's decision are not limited to poultry products or even agricultural products in general. Its effects on state sovereignty and interstate commerce are much broader. The logic of the decision permits a state not just to penalize but to altogether prohibit importation of products produced out of state based solely upon the state's disapproval of the production method used entirely beyond its borders. Such a regulatory regime would inevitably lead to trade wars among the states, which destroys the principle underpinning the dormant Commerce Clause.

The California Attorney General explicitly relied on the Ninth Circuit's decision in this case in defending California's extraterritorial regulation of the production of ethanol by out-of-state corn farmers in a

[4] For example, in 2010, Nebraska enacted the Livestock Animal Welfare Act. Neb. Rev. Stat. §§ 54-901 *et seq*. Nebraska law provides that a person "who cruelly mistreats a livestock animal" is guilty of a crime (a misdemeanor for the first offense and a felony for any subsequent offense). Neb. Rev. Stat. § 54-903(2). "Livestock animal" includes "poultry." Neb. Rev. Stat. § 54-902(9). And "cruelly mistreat" is defined to mean "to knowingly and intentionally . . . cause physical harm to a livestock animal in a manner that is not consistent with animal welfare practices." Neb. Rev. Stat. § 54-902(4).

case in which the affected industries are likewise seeking review by this Court. (*Rocky Mountain Farmers Union v. Corey*, Ninth Circuit Case No. 12-15131 at ECF Dkt. No. 206 [FRAP 28(j) Letter from California Attorney General].) As the dissent from the Ninth Circuit's denial of rehearing *en banc* in that case explained, "[u]nder the majority's reasoning, California could impose regulatory penalties . . . to require manufacturers in Texas to pay higher wages to their employees if they intend to sell their products in California." *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 518 (9th Cir. 2014). And, of course, "under the same logic, Texas could – and assuredly would – respond in kind, perhaps by penalizing California agriculture on account of its reliance on costly irrigation methods." *Id*.

Environmental standards, terms and conditions of employment, and the treatment of livestock vary widely among the states, to name just a few broad categories. If, as the Ninth Circuit would have it, states are permitted to ban out-of-state goods that were not produced using methods that comport with the scientific, aesthetic, or moral values of their citizens, the interstate market would be seriously damaged in exactly the manner the Commerce Clause prohibits.

As Justice Cardozo said in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), in striking down New York's attempt to condition the local sale of milk on the dealer's having paid a certain minimum price

to the milk producer – even if the dealer's purchase was made outside the state:

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce.

Id. at 527.

The inevitable retaliation against such laws will impermissibly fragment the "commerce . . . among the several States."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted this 30th day of May, 2014.

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