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 *AMICUS CURIAE* CONSEIL DE LA TRANSFORMATION AGROALIMENTAIRE ET DES PRODUITS DE CONSOMMATION (CTAC) IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Conseil de la Transformation Agroalimentaire et des Produits de Consommation (CTAC) is a Canadian organization representing a host of industry associations in the food production sector in Quebec. CTAC represents approximately 80% of the annual business volume of this industry in Quebec, which generates sales of CAD $23.5 billion (USD $21.6 billion).[2]

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1. In accordance with Rule 37.2 of the Rules of the Supreme Court of the United States, counsel for CTAC provided notice to counsel of record of the intention to file this *amicus curiae* brief in support of Petitioners. All parties have consented to the filing of this brief, and their written consent is submitted with this brief. In accordance with Rule 37.6, CTAC indicates that no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, that counsel for Petitioners, including Petitioner Association des Éleveurs de Canards et d'Oies du Québec (Canadian Farmers) — which is a CTAC member organization — authored this brief in substantial part, and that the Canadian Farmers funded the cost of printing of this brief.

2. CTAC's association members include the Association des Manufacturiers de Produits Alimentaires du Québec (AMPAQ), the Conseil de Boulangerie Québec (CBQ), the Association des Abbatoires Avicoles du Québec (AAAQ), the Conseil de l'Industrie de l'Érable (CIE), the Association des Embouteilleurs d'Eau du Québec (AEEQ), the Association des Producteurs de Cidre de Glace (APCG), the Association des Éleveurs de Canards et d'Oies du Québec (AECOQ), the Association des Vignernons du Québec (AVQ), the Association des Micro-Distilleries du Québec (AMDQ), the Fondation Initia, and the Association des Viniculteurs Négociants du Québec (AVNQ).

In 2010, Quebec recorded exports from its food production sector amounting to CAD $5 billion (USD $4.6 billion). With more than 56% of these goods going to the United States, the U.S. represents the main foreign market for these exports.

CTAC counts among its members over 500 businesses from across the food production industry. CTAC's mission is to ensure the representation, promotion, and defense of its members' interests and to advance the competitiveness of their products in both Canadian and foreign markets. CTAC also represents the food production industry in dealings with government authorities.

CTAC is especially concerned about the consequences of the Ninth Circuit's opinion in this case, which upholds a state-level ban on the sale of wholesome, USDA-approved poultry products from duck farmers in Canada. As applied to Petitioner Association des Éleveurs de Canards et d'Oies du Québec (Canadian Farmers), the California statute under review places an embargo on Canadian foie gras — not based on any concern for the health or safety of any California resident (or even of any California duck). Instead, § 25982 bans valuable Canadian poultry exports based *solely* on the superior method that farmers in Quebec use to feed their livestock — i.e., an activity that takes place entirely outside California's borders.

The Court of Appeals failed to see the constitutional infirmity of such an extraterritorial regulation under the interstate and foreign Commerce Clause. U.S. Const. art. I, sec. 8, cl. 3. Instead, in open defiance of this Court's longstanding jurisprudence, the Ninth Circuit told Petitioners that California is essentially free to wall off its market to their wholesome products. This is a dangerous precedent, as explained further below. CTAC respectfully urges this Court to grant the petition for certiorari.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision in this case threatens one of the most basic aspects of free trade in North America. California has every right to dictate the agricultural practices to be used by its own farmers out of concern for the welfare of the farm animals within its borders. But, under the Constitution, it has no business telling farmers in other States — or in provinces in other countries like Canada — how they must feed their livestock as a condition to the sale of the resulting product in interstate and foreign commerce. As the leading representative of the food production sector in Quebec, CTAC is concerned about the harmful effects on trade in agricultural products between Canada and the United States if the Ninth Circuit's erroneous decision is not reviewed by this Court.

ARGUMENT

I. The Ninth Circuit's Decision Upholds a State Law that Dictates the Agricultural Methods to Be Used by Farmers in Canada as a Condition to the Sale of Their Wholesome, USDA-Certified Poultry Products in California — and Thus Violates the Commerce Clause.

As the petition itself aptly explains, the Ninth Circuit's decision runs afoul of the Commerce Clause by upholding California's extraterritorial regulation of the methods of production of poultry products in Canada and New York. California of course cannot issue citations to Canadian farmers for their use of any particular feeding method on Canadian soil. But what § 25982 of the California Health and Safety Code does is just as inimical to the principles of free trade, to state and provincial sovereignty, and to the prerogative of the federal government to regulate foreign commerce.

With the blessing of the Ninth Circuit, California bans the sale of wholesome products that are the result of the Canadian Farmers' use of an agricultural practice that the California Legislature disfavors — even where that activity takes place *entirely* outside California. In so doing, the Court of Appeals has approved the erection of an unprecedented and unconstitutional blockade to commerce in wholesome products from out-of-state

farmers. CTAC submits this amicus brief to call the Court's attention to several aspects of the Ninth Circuit's opinion that create dangerous consequences for Canadian agricultural exports and that call for a grant of certiorari.

First, the Court should recognize the Ninth Circuit's opinion as upholding trade barriers not just to interstate commerce but also to foreign commerce. Petitioner Association des Éleveurs de Canards et d'Oies du Québec is a CTAC member that represents over a dozen Canadian duck farmers who produce wholesome food products, including for import into the United States. Yet § 25982 places California off-limits to these exports from Canada — one of the United States' key trading partners — and thus interferes with the federal government's exclusive authority to negotiate any restrictions on imports under the North American Free Trade Agreement (NAFTA).

As this Court has explained:

> It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny. It is crucial to the efficient execution of the Nation's foreign policy that the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments. In light of the substantial attention given by Congress to the subject of export restrictions on

> unprocessed timber, it would be peculiarly inappropriate to permit state regulation of the subject.

South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 100-01 (1984) (citations and quotation omitted).

Congress has given "substantial attention" to the importation of duck products from Canada, both through the import restrictions under the Poultry Products Inspection Act, 21 U.S.C. § 466, and under the NAFTA, which provides that, "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance . . . by state and provincial governments." 32 I.L.M. 289 (1993), Art. 105. Indeed, fatty livers of ducks are a specific article on the United States International Trade Commission's *Harmonized Tariff Schedule of the United States* that enter from Canada free of duty — only to now be completely banned from sale in California if a farmer in Quebec feeds his ducks more food than California dictates.

When Canada negotiates a trade treaty with the United States, it does so with all 50 States. For California — the largest of the States — to then isolate its market from Canadian goods based on a production method it dislikes not only violates the principles of free trade. It also violates the Commerce Clause. As this Court has explained,

"States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994). *A fortiori*, a State may not wield its market power to seek to control commerce in other countries.[3]

Second, the Ninth Circuit's opinion condones California's attempt to project its regulatory regime into Canada, which interferes with Quebec's sovereignty over its own farmers and livestock. The Canadian Farmers use a feeding method that enables them to obtain a higher yield from their ducks than the rest of the poultry industry does. The Canadian Farmers comply with all of the laws in Quebec and Canada. And every poultry product the Canadian Farmers produce for entry into the United States is from a duck that is inspected and certified by the USDA as wholesome and unadulterated and therefore fit for circulation in interstate commerce.

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3. California's assertion of such authority is particularly troubling in light of federal regulations issued by the United States Department of Agriculture, which are undermined by California's ban. Canada is one of just a handful of countries whose poultry products are expressly eligible for entry into the United States (subject to their inspection by the USDA). *See* 9 C.F.R. § 381.196(b). And Canada has some of the strictest laws against animal cruelty. Criminal Code of Canada, R.S.C. 1985, c. C-46 § 445.1.

Yet California impermissibly penalizes the Canadian Farmers based solely on the lawful agricultural method they use to feed their own ducks on their own farms in Quebec. *See Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) ("While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders."). With the Ninth Circuit's approval, California places its market off limits to the Canadian Farmers' products based on conduct that takes place thousands of miles outside California's borders. *See Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) ("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."). In so doing, the "practical effect of the California statute " — to use the test in *Healy* — is to deprive out-of-state farmers of the superior feeding method they have developed to optimize the economic value they obtain from their livestock.

Motivated by a concern for the welfare of farm animals in foreign lands (in this case, a misplaced one), California thus uses its market power to deprive the Canadian Farmers of an obvious competitive advantage. The Constitution does not tolerate a State's attempt to dictate a caloric scale for an animal in another country any more than it does a State's attempt to establish a wage scale for a

worker in another country. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935) ("It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed.").

Third, the Ninth Circuit's opinion opens the floodgates for any State to ban products from other States and countries based solely on a desire to dictate the conditions or methods of production to be used by producers far beyond its borders. Under the Ninth Circuit's reasoning, as long as there is some other production method available — no matter how inferior — out-of-state producers may only continue to produce their products "for non-California markets." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 950 (9th Cir. 2013). With the Ninth Circuit's blessing, California can now effectively say to producers anywhere in the world, "You will do anything that we want you to do on your own soil — no matter how remote — or we will deny you access to the largest market in the United States." This kind of extraterritorial regulation not only exceeds the limits of any State's police power in a system of federalism that places

such authority in the hands of Congress. It is also unprecedented in America.

Here, California treats wholesome products from sellers who do business with a neighbor in Canada *worse* than Massachusetts tried to treat products from those who did business with Burma in the late 1990s. In *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), the First Circuit considered a well-intentioned law that, in practice, allowed Massachusetts government agencies to purchase products from a company that did business with Burma only if the company's bid was 10% lower than all other companies. *Id.* at 45-46. (In other words, the statute was far less burdensome on commerce than California's complete ban on force-fed duck products here.) Massachusetts argued that the law "expresses the Commonwealth's own disapproval of the violations of human rights by the Burmese government." *Id.* at 46-47.

Despite this understandable sentiment, the First Circuit struck down the law as a violation of the foreign Commerce Clause. "Massachusetts may not regulate conduct wholly beyond its borders. Yet the Massachusetts Burma Law — by conditioning state procurement decisions on conduct that occurs in Burma — does just that." *Id.* at 69. Neither may California condition the sale of USDA-approved poultry products on conduct that occurs entirely in

Canada, which is why this Court should grant review and set the law straight on this issue of exceptional national importance.

Under the Ninth Circuit's reasoning, there is no limiting principle to prevent any State from banning any product based solely on its displeasure towards the production method used to produce it. Can any State in the Ninth Circuit now ban Canadian bacon produced from a pig that was fed more food than a "typical" pig would consume voluntarily? Or, for that matter, ban *any* product that was not produced using factors of production — materials, animals, human labor — in the same way as California requires for its own producers? In recognizing the pernicious effect of such extraterritorial regulation, at least seven judges on the Ninth Circuit just recently emphasized the danger of that court's new jurisprudence: "Now, the dormant Commerce Clause has been rendered toothless in our circuit, and we stand in open defiance of controlling Supreme Court precedent." *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 519 (9th Cir. 2014).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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