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

REPLY BRIEF OF PETITIONERS

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners respectfully refer the Court to the disclosure statement included in their Petition for a Writ of Certiorari, the information in which remains current.

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Because it affects not just foie gras but everything from fresh eggs to fried chicken, this case raises an issue of paramount national importance in terms of the sovereignty of the States over their own agricultural production in our economic union. Who gets to decide how farmers *in* New York and Canada may raise their livestock *in* New York and Canada if they want to continue selling their USDA-approved poultry products throughout *all* 50 of the United States? Not California. Contrary to the Ninth Circuit's opinion, this Court's precedents hold that no State may impose a ban on wholesome commerce to regulate conduct beyond its borders.

No fewer than 13 States have filed an amicus brief in this case to call foul on California's extraterritorial overreach. So has virtually the entire food exporting industry in Canada, our NAFTA trading partner. Following the denial of rehearing en banc in a related case, seven judges on a divided Ninth Circuit recently recognized, "Now, the dormant Commerce Clause has been rendered toothless in our circuit, and we stand in open defiance of controlling Supreme Court precedent."

Here, the Ninth Circuit's failure to follow this Court's precedents is one of the quintessential grounds for granting review. "Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari." E. Gressman, et al., SUPREME COURT PRACTICE, at 250 (9th ed. 2007); *see, e.g.*, *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (granting certiorari and reversing "[b]ecause the Ninth Circuit's holding is in direct conflict with our precedents").

California's response to the petition in this case attempts to brush decades of this Court's Commerce Clause jurisprudence under the rug. It then argues that the Court need not look under the rug at this stage in the case. Yet, as the 13 other States and a major Canadian trade organization have emphasized, the Ninth Circuit's ruling cries out for review — not only because it defies this Court's precedents on extraterritorial regulation but also because it threatens economic mayhem if States are now free to ban each other's products based on a desire to control their method of production.

Moreover, and contrary to the California Attorney General's suggestion, this issue of extraterritorial regulation under the Commerce Clause is primed for this Court's review. The district court has already found that California's closing of its market to Petitioners' wholesome poultry products is causing them to suffer *irreparable* harm. As exemplified by multiple cases from just this past term, the fact that a case reaches the Court following the denial of a preliminary injunction has never prevented it from reviewing a matter of constitutional dimension.

California's response thus only further highlights why the Court should grant the petition on this issue of exceptional national importance.

I. THAT 13 STATES TAKE ISSUE WITH CALIFORNIA'S MEDDLING IN THE REGULATION OF FARM ANIMALS FOR FOOD PRODUCTION IN OTHER STATES DEMONSTRATES THAT THIS IS A CASE OF EXCEPTIONAL NATIONAL IMPORTANCE, WHICH ONLY THIS COURT CAN RESOLVE

In response to the petition, California continues to ignore how the application of Section 25982 to wholesome agricultural products from out-of-state farmers up-ends the principles of free trade underlying the Commerce Clause. So did the Ninth Circuit. Yet no less than 13 other States have taken issue with a published Court of Appeals decision that — unless reviewed by this Court — will now serve to "green-light all similar forms of extraterritorial regulation of agricultural production in other states," with a correspondingly "profound impact on food production in this country." (*Amici* States' Brief at 7.)

What is also significant about the *Amici* States' support for the petition is that, as they note, they are not even producers of foie gras, i.e., the poultry product that animal rights activists and the California Legislature chose to target first here. (*Amici* States' Brief at 1, n.2.) Yet these 13 States, which span from Montana in the Northwest to Georgia in the Southeast, "have agricultural economies valued in the billions of dollars." (*Id.*) And they recognize, as should this Court, the extraordinary importance of the issue presented. If allowed to stand, the Ninth Circuit's decision allows California, or any other State, to "project its legislation" into other States by prescribing the production methods to be used in those other States. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511,

521 (1935) (striking statute that conditioned in-state sale of milk on price paid outside the state because "New York has no power to project its legislation into Vermont").

California tries to duck the effect of this Court's precedents by arguing that the statute here — which uses the hook of an in-state sale to dictate farming practices thousands of miles away — "regulates only the sale of products in the State of California." (Opp. Brief at 7.) Yet that coy claim entirely misses the point. As courts have recognized in rejecting such arguments, "The *Baldwin* Court found this type of regulation — which uses an in-state hook to affect out-of-state conduct — to be an impermissible exercise of state power in violation of the Interstate Commerce Clause." *Pharm. Research & Mfrs. of America v. Dist. of Columbia*, 406 F.Supp.2d 56 (D.D.C. 2005), *aff'd on other grounds*, *Biotech. Indus. Org. v. Dist. of Columbia*, 496 F.3d 1362, 1366 (Fed. Cir. 2007).

This Court has clearly and consistently instructed that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 332 (1989). Here, the Ninth Circuit's opinion below eviscerated *Healy* when it concluded: "*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product"). *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) As seven Ninth Circuit judges who dissented in a case raising a similar extraterritoriality issue recognized just this year, "In concluding otherwise, the majority disregards controlling precedent and departs from the holdings of the Supreme Court and our sister circuits." *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 517 (9th Cir. 2014).

With a quarter of the States and one of our NAFTA trading partners at odds with California and the Ninth Circuit over a basic principle of free trade under the Commerce Clause, this Court is the parties' only hope of an authoritative answer.

II. ONLY THIS COURT CAN SAY WHAT IT MEANT IN *BALDWIN*, *EDGAR*, *BROWN-FORMAN*, AND *HEALY* ABOUT THE COMMERCE CLAUSE'S PROHIBITION ON STATES' EXTRA-TERRITORIAL REGULATION

California attempts to avoid review of the Ninth Circuit's errant opinion by suggesting that this Court somehow discarded decades of its own Commerce Clause precedents when it decided *Pharm. Research & Mfrs. of America v. Walsh*, 538 U.S. 644 (2003). (Opp. at 7.) In the first place, the California Attorney General reads too much into the one-paragraph mention of the extraterritoriality issue in *Walsh*. The case simply recognized that Maine's program for offering manufacturers pre-approval of their prescription drugs in exchange for rebates had no extraterritorial effect whatsoever.

Quite unlike the application of Section 25982 to the out-of-state farmers here, the law at issue in *Walsh* did not even purport to condition the sale of the manufacturers' drugs on how they were produced outside the state. (A more analogous statute would be if Maine had banned the sale of drugs that are "the result of" testing on animals in other States and countries.) *Walsh* involved a *facial* attack on a statute that created a voluntary rebate program — not, like here, an as-applied challenge to a law that creates a mandatory ban under threat of prosecution. *See Pharm.*

Research & Mfrs. of America v. Concannon, 249 F.3d 66, 82 (1st Cir. 2001).

Indeed, "nothing in *Walsh* repudiates the principle that a state may not close its borders to out-of-state goods unless exporters alter their out-of-state conduct." *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 519 n.7 (9th Cir. 2014) (dissent from denial of rehearing en banc). Simply put, this Court has never held that the Commerce Clause only prohibits extraterritorial regulation of the *prices* under which commerce takes place in other States — let alone that it somehow permits States to dictate the methods of production for goods produced beyond state lines.

Various precedents from this Court have struck down extraterritorial regulations that had nothing to do with prices, and these cases have not been overruled *sub silentio*; quite the contrary, they remain the supreme law of the land today. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (invalidating application of Illinois anti-takeover statute to transactions of out-of-state shareholders because, "[w]hile protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders"); *see also American Beverage Ass'n v. Snyder*, 700 F.3d 796, 807-10 (6th Cir. 2012) (invalidating Michigan law with impermissible extraterritorial effect of requiring returnable containers to have unique-to-Michigan mark to prevent fraudulent redemption of container deposit). In any event, it is for *this* Court — not California and not the Ninth Circuit — to speak to the vitality of the extraterritoriality doctrine in its Commerce Clause jurisprudence.

California also downplays how Section 25982 of its Health and Safety Code (a provision that actually concerns neither health nor safety) operates to deprive out-of-state farmers of a competitive advantage. It is of no consequence to the extraterritoriality analysis that California does not allow its own duck farmers to "force feed" to produce the larger, more valuable livers that Hudson Valley and the Canadian Farmers do. In each of this Court's leading precedents cited in the parties' briefs — *Baldwin*, *Brown-Forman*, and *Healy* — the fact that in-state sellers were not left with any advantage made no difference in the analysis. Similarly, it is no answer to say that Petitioners can avoid California's overreach by simply withdrawing from the California market. This would defeat one of the very purposes of the Commerce Clause, which was to prevent economic isolationism and barriers to trade. The point has always been that the regulating State has no power under the Commerce Clause to foist its preferred practices on producers in *other* States.

The danger of leaving the Ninth Circuit's opinion unchecked is that it is already threatening other industries, such as eggs, where California is again using the hook of in-state sales to dictate the sizes of cages for laying hens in other States. California's newfound appetite for regulating even out-of-state farmers has led Missouri and five other States to sue California for its transparent violation of the Commerce Clause. Not surprisingly, in defense of its extraterritorial regulation, California relies heavily on the Ninth Circuit's opinion below in *this* case. It is perhaps no wonder that the 13 *Amici* States urgently ask this Court to take up the issue today — *before* the Ninth Circuit's ruling devastates other industries as well.

Review on the merits by this Court will provide necessary clarity at a crucial time.[1]

III. THIS COURT HAS NEVER SHIED FROM GRANTING REVIEW OF A PRELIMINARY INJUNCTION DECISION THAT SQUARELY PRESENTS A VITAL CONSTITUTIONAL QUESTION

The remainder of California's opposition consists of its suggestion that, because this petition reaches the Court

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1. California notes that there is no textbook circuit split here and refers to statutes involving horsemeat and products from companion animals like dogs and cats. (Opp. at 10.) This is a red herring. In the first place, the Ninth Circuit's reliance on the horsemeat cases from other courts of appeals was what led to its 9-0 reversal in *Nat'l Meat Ass'n v. Harris*, 132 S.Ct. 965 (2012). There, Judge Kozinski had declared that "states are free to decide which animals may be turned into meat" — to which this Court responded, "We think not." *Id.* at 973. More critically, however, none of the cited statutes involved the ban of a USDA-approved agricultural product based entirely on the farming method by which it is produced, as does the California law at issue here.

In any event, the notion that a State may ban interstate and foreign commerce — such as the products of ducks raised entirely in New York and Canada — based solely out of "moral disapproval" of the circumstances of its production has been rarely advanced and roundly rejected. 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), when Massachusetts tried to impose even a slight burden on commerce in goods associated with the repression of *human* rights in Burma, the First Circuit, citing the foreign Commerce Clause, effectively said, "No way," and this Court affirmed (albeit on other grounds). Today, California imposes a complete ban on commerce in goods from out-of-state farmers who it believes are encroaching on *animal* rights, and the Ninth Circuit says, "No problem."

on an appeal from the denial of a preliminary injunction, it is somehow less suitable for review. That argument ignores recent history. In just this past term, several of the Court's most anticipated decisions were in cases that came to it following a ruling at the preliminary injunction stage. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 2014 WL 2921709, at *1 (U.S. Jun. 30, 2014) (granting cert in two cases at preliminary injunction stage); *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 134 S.Ct. 2498, 2504 (2014) (granting cert after Second Circuit affirmed denial of preliminary injunction and denied rehearing *en banc*). Indeed, just two terms ago, this Court granted review — at the preliminary injunction stage — in *Nat'l Meat Ass'n v. Harris*, 132 S.Ct 965 (2013), a case like this one, in which an association of agricultural producers successfully challenged the constitutionality of a California statute that burdened commerce in the name of animal welfare.[2]

Where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status — particularly if the lower court's decision is patently incorrect and the interlocutory decision, such as a preliminary injunction, will have immediate consequences for the petitioner." E. Gressman, *supra*, at 281 (citing cases); *see, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975

2. California also claims that Petitioners have a pending "statutory," as opposed to constitutional, preemption claim, and that this should somehow preclude review today. (Opp. at 9 & 2, n.2.) While not the subject of this petition, the Court will surely recognize that a claim of federal preemption of a State statute is plainly a constitutional claim in that it arises under the Supremacy Clause.

(1997) (per curiam) (granting review where interlocutory Ninth Circuit "decision is clearly erroneous under our precedents" and "has created a real threat of [immediate] consequences").

Here, the district court has already found that, as a result of Section 25982, Petitioners are suffering "irreparable harm." The legal question before the Court is of extraordinary national importance to free trade in poultry products — and in all others whose production methods a State may disfavor. The Ninth Circuit's open defiance of this Court's long-established precedents cries out for review. This Court's decision as to the constitutionality of the statute will thus set the law straight for the Ninth Circuit and all other courts — and will provide Petitioners the injunctive relief they have been seeking for two years as they now arrive at the doorstep of this Court.

Today, this case comes to the Court in response to California's attempt to project its regulatory regime on the farmers of millions of ducks in other States and Canada. But whether it affects millions or billions of farm animals essential to our nation's food supply, this Court should not put off until tomorrow what it can — and should — do today under Rule 10(c). This Court has not taken up a case squarely involving extraterritorial regulation under the Commerce Clause in over 25 years. This case presents the question as cleanly as the Court could ever expect to see it: Can a State ban wholesome agricultural products from other States and countries based solely on a desire to force out-of-state farmers to "modify" their "agricultural practices"?

That question could not have greater national importance than it does today.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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