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,
Respondent.

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

Brief of *Amici Curiae* the State of Missouri and 10 Other States Supporting Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION AND INTEREST OF *AMICI*

This case involves a single State's attempt to defy federal law and dictate the manner of agricultural production in every other State.

California is flouting the limits that federal law puts on California's regulatory reach. Under the Constitution and federal statutes, California lacks power to regulate agriculture or commerce beyond its borders. But, despite the text and structure of federal law, California is enacting law after law governing other States' economies. And no matter how many times California's laws regulate other States, the Ninth Circuit refuses to enjoin these regulations and enforce federal law—even after this Court unanimously reversed the Ninth Circuit in a strikingly similar case. As a result, producers nationwide face more and more closed markets and consumers nationwide suffer increasingly inflated prices. Worse still, other States like Massachusetts and Colorado have begun to follow California's lead and pass such extraterritorial laws themselves.

Because California interferes with other States' sovereign interests in ensuring compliance with federal law within their borders, *amici* States urge this Court to grant review.[*]

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[*] *Amici* are the States of Missouri, Arkansas, Indiana, Michigan, Montana, Oklahoma, North Dakota, South Carolina, Texas, Utah, and West Virginia. Under Supreme Court Rule 37.2(a), *amici* have timely notified the parties of their intent to file this brief.

SUMMARY OF ARGUMENT

Unless this Court intervenes, California will continue to regulate other States in violation of federal law and in disregard of other States' sovereign interests. In fact, other States have begun to follow California's lead and seek to regulate other States' economies in violation of federal law.

ARGUMENT

I. California persistently ignores federal law by extraterritorially regulating other States' agricultural and industrial production.

In *National Meat Association* v. *Harris*, this Court held that California had imposed agricultural-production regulations on other States in violation of federal law. The Federal Meat Inspection Act preempts state laws imposing conditions on slaughterhouses "in addition to or different from" those Congress set. 565 U.S. 452, 468 (2012). California's then-prohibition of the slaughter of nonambulatory animals for human consumption at slaughterhouses flouted this law. *Id*. at 459. This Court unanimously held that the FMIA's preemption clause "prevents a State from imposing any additional or different—even if non-conflicting—requirements" on meat products. *Id*. at 459–60. The clause "covers not just conflicting, but also different or additional state requirements," and it "precludes California's effort . . . to impose new rules, beyond any the [federal government] has chosen to adopt" for products shipped from other States. *Id*. at 460–61. California's regulation thus "runs smack into the [Act's] regulations" because "at every turn" it "imposes

additional or different requirements" than what federal law requires. *Id.* at 459–60, 467.

But, despite this Court's unanimous rebuke, California has repeatedly enacted strikingly similar agricultural laws. In fact, *National Meat Association* and the present petition concern just two of several attempts by California to dictate the manner of agricultural and industrial production in other States. California also seeks to control ethanol production in other States' cornfields and refineries, *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507 (9th Cir. 2014), and to dictate the manner of egg production of other States, *Missouri* v. *California*, No. 22O148 (U.S.), in violation of federal law.

A. In the Global Warming Solutions Act of 2006, the California legislature decided to reduce greenhouse gas emissions to 1990 levels by the year 2020, and so the California Air Resources Board promulgated the Low Carbon Fuel Standard. This standard makes businesses that sell transportation fuels in California reduce the carbon intensity of their fuels by ten percent before 2020. *See Rocky Mountain Farmers Union*, 740 F.3d at 513 (Smith, J., dissenting from denial of rehearing en banc). Carbon intensity measures how carbon-intensive the production process is for making, distributing, and using a particular source of fuel. *Id.*

California's standard openly assigns higher carbon intensity to out-of-state ethanol than to chemically identical in-state ethanol. *Id.* Californians thus had to reduce their use of out-of-state ethanol to comply with California's law.

These ethanol regulations violate the federal Commerce Clause. The Commerce Clause prohibits States from enacting legislation that intentionally discriminates against citizens of other States, that regulates conduct wholly outside their borders, or that places an undue burden on interstate commerce. California's regulations infringed on the sovereign interests of ethanol-producing States "to regulate farming, ethanol production, and other activities within their own borders as they see fit." *Id.*

Indeed, the "central concern" of the Commerce Clause—especially its dormant or negative component—was to prevent the friction between States arising from interstate trade barriers that plagued the Articles of Confederation. *Hughes* v. *Oklahoma*, 441 U.S. 322, 325–26 (1979). "The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Id.* As James Madison commented, if the individual States "[w]ere . . . at liberty to regulate the trade between State and State," interstate trade barriers "would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility." THE FEDERALIST No. 42 (Madison), at 214 (Garry Wills, ed. 1982).

After all, "[t]rade barriers may cause a blight no less serious than the spread of noxious gas over the

land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 606 (1982) (brackets omitted) (quoting *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 450–51 (1945)).

But the Ninth Circuit disregarded this Court's precedent and upheld California's ethanol regulations. Praising California for having "long been in the vanguard of efforts to protect the environment, with a particular concern for emissions from the transportation sector," the Ninth Circuit decided that California's ethanol regulations do not facially discriminate against out-of-state commerce and that its initial crude-oil provisions did not discriminate against out-of-state crude oil in purpose or practical effect. *Rocky Mountain Farmers Union* v. *Corey*, 730 F.3d 1070, 1078 (9th Cir. 2013).

As several judges wrote in dissent, the Ninth Circuit decision in that case "gives short shrift to the principle that '[s]tate laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Rocky Mountain Farmers Union* v. *Corey*, 740 F.3d 507, 515 (9th Cir. 2014) (M. Smith, O'Scannlain, Callahan, Bea, Ikuta, N.R. Smith, & Murguia, J.J., dissenting from denial of rehearing en banc) (citing *Granholm* v. *Heald*, 544 U.S. 460, 476 (2005). The Ninth Circuit's decision "abjures the rule that 'a state law that has the practical effect of regulating commerce occurring wholly outside that State's borders is invalid.'" *Id*. (citing *Healy* v. *Beer Inst.*, 491 U.S. 324, 332 (1989).

The dissent thus chastised the Ninth Circuit for upholding "a regulatory scheme that, on its face, promotes California industry at the expense of out-of-state interests." *Id.* at 519. And it refused to join the majority in sanctioning "California's clear attempt to project its authority into other states." *Id.*

This Court denied review. *Corey* v. *Rocky Mountain Farmers Union*, 134 S. Ct. 2884 (2014); *Rocky Mountain Farmers Union* v. *Corey*, 134 S. Ct. 2875 (2014); *Am. Fuel & Petrochemical Mfrs. Ass'n* v. *Corey*, 134 S. Ct. 2875 (2014).

B. California is also seeking to regulate egg production in other states in clear violation of federal law. *Missouri* v. *California*, No. 22O148 (U.S.).

In November 2008, California voters enacted Proposition 2, a ballot initiative that prohibited California farmers from employing methods of agricultural production that are common throughout the United States. *See* Cal. Health & Safety Code §§ 25990-25994. Proposition 2 directed that "a person shall not tether or confine any covered animal," including any egg-laying hen, "on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely." Cal. Health & Safety Code § 25990(a)–(b). These regulations are contrary to common agricultural practices elsewhere in the United States, and no federal standards for egg production require them.

California farmers and economists immediately raised concerns that Proposition 2's restrictions would

place California farmers at a competitive disadvantage with respect to non-California farmers in the California egg market. These researchers forecast that Proposition 2 would require California egg producers to make about $385 million in capital improvements. *See, e.g.*, Hoy Carman, Economic Aspects of Alternative California Egg Production Systems, at 22 (2012), available at https://www.cdfa.ca.gov/ahfss/pdfs/regulations/Dr_Hoy_Carman.pdf.

The California legislature thus sought to "level the playing field" by making egg production equally onerous for all out-of-state producers that ship eggs to California. It passed Assembly Bill 1437, which imposed on non-California producers the same standards that Proposition 2 had imposed on California producers with the same effective date. This law enacted Section 25996, which provides that "[c]ommencing January 1, 2015, a shelled egg may not be sold or contracted for sale for human consumption in California if it is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in Chapter 13.8 (commencing with Section 25990)." Calif. Health & Safety Code § 25996.

But these egg regulations violate federal statutory and constitutional law. The federal Egg Product Inspection Act (EPIA) forbids States from imposing on eggs shipped in interstate commerce any "standards of quality" or "condition" that are "in addition to or different from the official Federal standards." 21 U.S.C. § 1052(b). The production standards that California imposes on out-of-state egg producers are

manifestly "in addition to or different from the official Federal standards," and thus illegal under federal law. *Id.* California's regulations also violate the Commerce Clause and the structural limitations inherent in the Constitution. Because the standards California's Act incorporated already applied to California producers, the sole purpose and effect of this law was to regulate the conduct of egg producers outside California.

In short, California has repeatedly disregarded the constraints that federal law imposes on its ability to regulate production in other States, especially in their agricultural sectors.

II. California's persistent disregard for federal law warrants this Court's intervention.

This Court should grant review in this case not only to rectify the private injuries suffered by producers like the petitioners here, but also to rectify substantial sovereign harms suffered by States across the country.

California's extraterritorial regulation of agricultural and energy production in other States has serious consequences for the citizens and economies of those States. Where the "economy of [each State] and the welfare of her citizens have seriously suffered as the result" of the challenged trade barrier, the State has a core sovereign interest in seeking relief against "a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister

States." *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. at 450–51.

The Framers designed this Court's jurisdiction to redress sovereign injuries like those that California imposes here. *North Dakota* v. *Minnesota*, 263 U.S. 365, 373 (1923). Before the States adopted the Constitution, States—like other sovereigns—had two options to settle disputes relating to interstate trade: war or diplomatic negotiation. *South Carolina* v. *Regan*, 465 U.S. 367, 397 (1984) (O'Connor, J., concurring). The Framers created this Court's jurisdiction over disputes between States "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." *Texas* v. *New Mexico*, 2018 WL 1143821, at *3 (U.S. Mar. 5, 2018) (citation omitted).

Trade barriers among States and intrusions on other States' territorial sovereignty generate the very interstate friction that the U.S. Constitution was designed to avoid. "[T]he exercise of sovereign power" encompasses irreducible elements, including "the power to create and enforce a legal code" and "the maintenance and recognition of borders." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). Other sovereigns "have no force to control the sovereignty or rights of any other nation." *The Apollon*, 22 U.S. 362, 370 (1824).

Principles of federalism counsel in favor of granting review in a case challenging one of California's many extraterritorial regulations. When it comes to citizens' interests under federal statutes, neither the States nor this Court need "wait for the Federal Government to vindicate the State's interest

in the removal of barriers to the participation by its residents in the free flow of interstate commerce." *Alfred L. Snapp,* 458 U.S. at 608. "[F]ederal statutes creating benefits or alleviating hardships," such as the NMIA, the EPIA, and the PPIA, "create interests that a State will obviously wish to have accrue to its residents." *Id*. "[A] State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system," including those that arise from federal statutes, "are not denied to its general population." *Id*.

B. California's history of ignoring federal statutes almost identical to the statute here counsels strongly in favor of granting review. In addition to the meat regulations enacted in violation of federal law in *National Meat Association*, the ethanol regulations enacted in violation of federal law in *Rocky Mountain Farmers Union* v. *Corey*, 730 F.3d 1070 (9th Cir. 2013), and the egg regulations enacted in violation of federal law in *Missouri* v. *California*, California enacted the law at issue in this case, which regulates production on duck and goose farms beyond California's borders in contravention of the Poultry Products Inspection Act (PPIA), 21 U.S.C. § 451 *et seq*.; Pet. 4–10.

In fact, California has become so emboldened by failure to enforce these federal laws that it has taken the unprecedented step of sending agricultural inspectors into other States to register and inspect their egg production facilities. *Missouri*, No. 22O148, Compl. ¶¶ 13, 28, & States' Br. 9.

These inspection actions compound the harm to other States' sovereignty. When California sends its law enforcement officers to "exercise their functions in the territory of another state" without the consent of the other state," Restatement (Third) of Foreign Relations Law § 432 (1987), it violates the sovereign right of other States to exercise "lawful control over its territory generally to the exclusion of other states." *Id*. § 206 cmt. B. Here, California's regulations violate federal statutory law, which "is as much the law of the several States as are the laws passed by their legislatures." *Haywood* v. *Drown*, 556 U.S. 729, 734 (2009). And so, when California sends officials into other States to "inspect" their egg producers for compliance with California policy, California interferes with the sovereign interests of those States in ensuring compliance with federal law and in controlling state-level enforcement authority within their borders.

C. Not granting certiorari would embolden States like California to continue to contravene federal law.

In fact, other States have already started to follow California's lead. At least two States impose extraterritorial laws of their own. For example, Colorado is seeking to regulate electricity production in other States by requiring any electricity on the national grid that flows to Colorado to be composed of 20 percent renewable energy sources. *Energy & Env't Legal Inst.* v. *Epel*, 793 F.3d 1169 (10th Cir. 2015). Likewise, Massachusetts just enacted a law governing the manner in which farms in other States raise poultry, hogs, and calves. *Indiana* v. *Massachusetts*, No. 22O149 (U.S. 2017). If this Court continues

declines to intervene, more States will enact extraterritorial regulations of agriculture and industry, leading to increased interstate friction and rivalry.

This Court thus should grant review in this case and in the other pending cases presenting these important federal issues. This Court often grants review when a pattern of cases raises the possibility that many states will engage in similar practices if this Court does not intervene. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 453–54 (1992).

CONCLUSION

The petition for writ of certiorari should be granted.

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