No. 21-468

IN THE

Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL, ET AL.,

Petitioners,

v.

KAREN ROSS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD & AGRICULTURE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC, HVFG LLC, AND SEAN "HOT" CHANEY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

INTEREST OF THE AMICI[1]

Association des Éleveurs de Canards et d'Oies du Québec includes the leading duck and goose farmers in Canada. HVFG LLC, known as Hudson Valley Foie Gras, is the largest producer of wholesome, USDA-approved foie gras products in the United States and raises ducks on its farm in New York. Sean "Hot" Chaney is a California chef who would like to resume selling these farmers' prized poultry products.

Amici have a vital interest in this case because they are the challengers to a California law that is like the statute at issue here but that bans their wholesome, unadulterated, federally-inspected agricultural products based *solely* on how the animals from which they were produced had been raised on farms in *other* States and countries. Cal. Health & Safety Code § 25982; Cal. Health & Safety Code § 25990.

In *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 397 (9th Cir. 2013) ("*Canards I*"), *amici* raised the same foundational question at the heart of this case: whether a State may ban commerce in wholesome, unadulterated, federally-inspected agricultural products from other States and countries based on the State's disfavor of the farming practices used on farms far outside its borders.

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[1] Pursuant to this Court's Rule 37.3(a), *amici* affirm that all parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, *amici* further affirm that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

In a deeply flawed opinion that flouts this Court's dormant Commerce Clause precedents, the Ninth Circuit held in *Canards I* that, if *amici* feed their ducks — back in Canada and New York — more food than California thinks they should consume, then California can close its market to their USDA-approved poultry products. *Id.* at 950.

Just last month, in a split opinion in *amici*'s case, the Ninth Circuit doubled down on that erroneous holding, as further discussed below. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Bonta*, 33 F.4th 1107 (9th Cir. 2022) ("*Canards III*").

The outcome in this case is highly likely to have a direct impact on *amici*'s case (which is currently the subject of a petition for panel rehearing and rehearing en banc). Moreover, beyond their own case, *amici* are interested in the Court reaching the right result in this one to ensure the natural functioning of the interstate market for USDA-approved agricultural products — free from the kinds of unconstitutional extraterritorial regulation and burdens on commerce that California, with the Ninth Circuit's blessing, has continued to impose.

SUMMARY OF THE ARGUMENT

As noted above, for nearly a decade, *Amici* have litigated in the Ninth Circuit the dormant Commerce Clause issues on which the Court granted certiorari in this case. *Amici* fully support the arguments of Petitioners and submit this brief to make one principal point.

As the Court may have surmised, the Ninth Circuit's interpretations of this Court's extra-territoriality doctrine are not only disrespectful of longstanding precedent but also disastrous for commerce in the free trade area that is the United States. As at least seven judges of that court of appeals recognized in another case, "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) (dissenting from denial of en banc review).

The Ninth Circuit's dangerous dormant Commerce Clause jurisprudence traces to its opinion in *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 397 (9th Cir. 2013) ("*Canards I*") and — until the Court reverses here — will continue to damage the market for wholesome meat and poultry products, especially in light of that circuit's most recent opinion in *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Bonta*, 33 F.4th 1107 (9th Cir. 2022) ("*Canards III*"). This Court should reverse the judgment below and, in doing so, expressly disapprove the contrary holdings in these cases.

ARGUMENT

The ultimate substantive question in this case actually boils down to a version of *who gets to decide*. Who gets to decide how comfortable a farm animal in a particular State must be as a condition to the sale of its meat throughout the rest of the Nation? Under this Court's longstanding precedent, in the absence of congressional action, the obvious answer should be: the sovereign State in which the farm animal is raised. (And it should not be forgotten that, in a free society, decisions about which federally-inspected food products to buy and whether to base those decisions on any aspect of farm animal welfare are ultimately made by consumers.)

Indeed, no matter how altruistic its intentions, California may not specify the living space for a pig in Iowa or dictate the diet of a duck in Quebec as a condition to the sale of their resulting products any more than it could do so for the farmers themselves. California and the Ninth Circuit think otherwise. But, while California is free to legislate the animal husbandry requirements of every farm animal within its police power, it has no business dictating to farmers in other States — let alone in other countries — how much room to provide their animals or how much food to feed them. By punishing the sale of wholesome meat and poultry products from other States with $1,000 penalties per product sold per day, that is exactly what Proposition 12 and laws like it impermissibly do.

I. The Ninth Circuit's View of the Extra-territoriality Doctrine Is Disjointed — and Destructive of the Interstate Market.

The origin of the Ninth Circuit's errant extraterritoriality jurisprudence is *Canards I*. In 2004, California enacted a first-of-its-kind ban on the sale of wholesome poultry products based on whether they are "the result of" feeding poultry birds "more food" than California believes is enough for them to eat. Cal. Health & Safety Code §§ 25982, 25980(b).[2] (The ban was aimed at foie gras products, since their production requires special feeding of ducks and geese to fatten their livers.) Like Proposition 12 here, California bans the sale of these products even when the farm animals from which the products are made had been raised entirely outside the State.

The Ninth Circuit issued its decision in *Canards I* nearly a decade ago. Judge Pregerson's opinion in that case found this Court's entire line of extraterritorial regulation cases inapplicable because the California ban "is not a price fixing statute." *Canards I*, 729 F.3d at 950. In the opinion below, the Ninth Circuit followed this same reason in departing from this Court's extraterritoriality doctrine, as Petitioners explain. (Pet. Brief at 18-19.) But even the Ninth Circuit itself has recognized impermissible extraterritorial regulation in multiple other cases not involving price-fixing at all. *See, e.g., Sam Francis Fdn. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc); *Daniels Sharpsmart, Inc. v. Smith*, 889

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[2] A California ban on the sale of "meat or products of nonambulatory animals," i.e., "cattle, swine, sheep, or goats" that are "unable to stand and walk without assistance," was later enacted in 2008. Cal. Pen. Code § 599f. This Court unanimously struck it down on preemption grounds in *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012).

F.3d 608 (9th Cir. 2018). And, as Petitioners and other amici point out, this Court has never limited this doctrine to price controls.

Just last month, in *Canards III*, a two-judge majority of the Ninth Circuit apparently felt it had little choice but to follow *Canards I* based on another untenable rationale. As it concluded, "California's sales ban prohibits only *in-state* sales of foie gras, *Canards I*, 729 F.3d at 949, so it is not impermissibly extraterritorial even if it influences out-of-state producers' conduct." 33 F.4th at 1119 (emphasis added). But every statute that this Court has struck down based on its extraterritorial effect used the "hook" of an "in-state" sale in attempt to "influence" conduct beyond the boundaries of the State. "That the ABC Law is addressed only to sales of liquor *in New York* is irrelevant if the 'practical effect' of the law is to control liquor prices in other States." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 583 (1986) (emphasis added).

In any event, could a law that requires sellers to pay their workers California's minimum wage as a condition to the "in-state" sale of their products really be deemed merely an "influence"? And if California can impose such conditions on how much living space a pig must have or how much food a duck may consume — out of some attenuated interest in the lives of foreign farm animals — then, based on an interest in the welfare of human beings, there would be no logical reason why it could not similarly condition sales on how much living space the *farmworkers* themselves must have or how much food *they* may consume. That simply cannot be the doctrine of this Court, and fortunately it is not.

As the First Circuit explained in a case where — based on its disapproval of human rights violations in Burma — Massachusetts sought to impose a 10% bid premium on products from companies that did business with Burma, "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." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1st Cir. 1999), aff'd sub nom. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). The same is true here.

And as Justice Cardozo made clear in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (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 … unless the scale has been observed." *Id.* at 528. If a State may not constitutionally ban products based on its view about how *human beings* are paid in other States, then it surely may not do so based on how out-of-state pigs are housed or poultry birds are fed either.

Indeed, if California contends that a ban on only the "in-state" sale of products based solely on the conduct of farmers entirely outside the State somehow does not constitute extraterritorial regulation, consider asking Respondents any of the following hypotheticals:

- Could another State, in order to "influence" farmers in California and other States to save water, ban the in-state sale of all goods from farms that do not adhere to its own irrigation

standards?

- Could another State, in order to "influence" farmers to improve working conditions for farmworkers in California and other States, ban the in-state sale of all goods produced through stoop labor?
- Could another State, in order to "influence" employers in California and elsewhere to adhere to its values, ban the in-state sale of all goods and services from businesses that provide financial support for abortions?

Would California say that such laws are merely an "influence" and do not — in practical effect — attempt to regulate what may be lawful (or even constitutionally protected) conduct in those other States? And, for purposes of this Court's test for when a nondiscriminatory state law places an undue burden on interstate commerce under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), would California say that such laws are justified by the State's interest in "prevent[ing] complicity" in practices it disapproves of, as the Ninth Circuit held in *Canards I*, 729 F.3d at 952? *Amici* suspect that California's answers would be "No."

Under the Ninth Circuit's holdings, even a total ban on meat or poultry products would not place a cognizable burden on commerce. But a State simply has no legitimate local interest in the comfort of a farm animal raised in another State or country in compliance with that other jurisdiction's laws on animal welfare.

CONCLUSION

The Court should reverse the judgment below and expressly disapprove of the dormant Commerce Clause holdings in the Ninth Circuit's opinions in *Canards I* and *Canards III*, which defy this Court's teachings and common sense.

Respectfully submitted,

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