No. 22-472

IN THE
Supreme Court of the United States

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC; HVFG LLC; AND SEAN "HOT" CHANEY,

Petitioners,

v.

ROB BONTA, IN HIS 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 CONSEIL DE LA TRANSFORMATION ALIMENTAIRE DU QUÉBEC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*[1]

The Conseil de la Transformation Alimentaire du Québec ("CTAQ") is a Canadian organization representing fourteen industry associations in the food production sector in Quebec, ranging from poultry and meat processing to duck and goose breeders to maple syrup.[2] CTAQ represents approximately 80% of the annual business volume of the food production sector in Quebec, which currently generates sales of CAD $33.5 billion (USD $24.6 billion). CTAQ represents its members' interests in

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[1] This brief was authored by counsel of record for amicus curiae, and no part was authored by counsel for any party. No party or its counsel made any monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus curiae, their members, or their counsel made any such monetary contribution. Counsel for amicus curiae provided timely notice to counsel of record for all parties of his intent to file this brief, and counsel of record for all parties have provided their written consent.

[2] CTAQ's association members include le Conseil Québécois de la Transformation de la Volaille (CQTV), le Regroupement des Transformateurs de Viandes du Québec (RTVQ), l'Association des Éleveurs de Canards et d'Oies du Québec (AECOQ), Amélioration Alimentaire Québec (AAQ), l'Association des Manufacturiers de Produits Alimentaires du Québec (AMPAQ), l'Association des Négociants Embouteilleurs de Vins (ANEV), l'Association des Petits Embouteilleurs d'Eau du Québec (APEEQ), l'Association des Producteurs d'Hydromels et d'Alcools de Miel du Québec (APHAMQ), l'Association des Torréfacteurs Artisans du Québec (ATAQ), le Conseil de Boulangerie Québec (CBQ), le Conseil de l'Industrie de l'Erable (CIE), le Conseil Québécois du Cannabis Comestible (CQCC), la Fondation INITIA, and l'Union Québécoise des Microdistilleries (UQMD).

foreign trade opportunities and government relations, including with the United States, Canada's largest trading partner. In 2021, more than $32.5 billion of food and beverage products were exported from Canada to the United States, and more than $6.1 billion of those products came from Quebec.

While foie gras products represent a very small portion of Canadian food exports, the California foie gras ban is the proverbial "canary in the coal mine" on the issue of whether states may enact regulations concerning food product specifications that conflict with United States Department of Agriculture ("USDA") regulations, making it impossible for Canadian food exporters to comply with both the federal and state regulations. CTAQ has an essential interest in ensuring that food producers in Quebec are not forced to withdraw from exporting products to California to avoid violating either federal or state law.

It is well settled that USDA regulations on meat and poultry production preempt different state law standards. *Cf. National Meat Ass'n v. Harris*, 565 U.S. 452 (2012) ("*National Meat*") (finding state regulation precluding the sale of meat from non-ambulatory pigs was preempted under the Federal Meat Inspection Act). Further, where federal regulations directly conflict with state regulations – which is the case with the California foie gras ban – Canadian food producers should not be forced to exit the market or choose between violating state or federal law. *See Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472, 488 (2013) (rejecting the "stop-

selling rationale" to resolve impossibility preemption scenarios).

By filing this amicus brief, CTAQ seeks to protect its members from the burden of complying with a patchwork of state and local regulations, and from having to choose between violating state law, violating federal law, or simply withdrawing from a market in which compliance with both state and federal law is impossible.

SUMMARY OF ARGUMENT

For nearly three decades, since 1993 under the North American Free Trade Agreement ("NAFTA"), 19 U.S.C. 3301 *et seq*., and since 2020 under the United States Mexico Canada Agreement ("USMCA"), 19 U.S.C. 4501 *et seq*., the ability of Canadian poultry producers to export their products duty-free for sale to any state in the United States has been guaranteed by international treaty, so long as the poultry products comply with USDA regulations. To avail themselves of the opportunity to export their products to the United States, Canadian poultry producers and processors voluntarily comply with USDA regulations on Canadian soil and subject their facilities in Canada to USDA inspections.

The Ninth Circuit's decision in *Association des Éleveurs de Canards et d'Oies du Québec v. Bonta*, 33 F.4th 1107 (9th Cir. 2022), upends the long standing principle that what food products may be sold in the

United States is subject to regulation at the federal level, not at the state or local level. If left undisturbed, the Ninth Circuit's decision will allow any state or local government to enact regulations that directly conflict with USDA regulations. Canadian food producers will be forced to stop selling certain products in certain states or choose between violating state law or federal law – notwithstanding the USMCA, which guarantees them duty-free access to the entire United States market.

The petition for certiorari should be granted to address both the issue of federal preemption and the dormant Commerce Clause issues raised by the petitioners. Even though there is some overlap between the dormant Commerce Clause issue raised by the California foie gras ban and the issues presently before the Court in *Nat'l Pork Producers Council v. Ross*, No. 21-468 (argued Oct. 11, 2022), the petition for certiorari should nonetheless be granted to address the preemption issue in this case.

ARGUMENT

I. Canadian Foie Gras that Complies with USDA Regulations Cannot be Lawfully Sold in California, while "Foie Gras" that Complies with California Law Would be Considered an Adulterated Product under USDA Regulations.

The USDA has approved foie gras for human consumption and enacted regulations governing the requirements to sell duck or goose liver as foie gras. The USDA FOOD STANDARDS AND LABELING POLICY BOOK mandates that foie gras be "obtained exclusively from specially fed and fattened geese and ducks." CA9.20-55882.Dkt.30 at SER-210 (excerpt from USDA's FOOD STANDARDS AND LABELING POLICY BOOK). The USDA also requires "minimum duck liver or goose liver foie gras content" ranging from 50%, 85%, or 100% for 14 different poultry products containing foie gras, such as "torchon style" foie gras, terrines, and parfaits. CA9.20-55882.Dkt.30 at SER-210.

If a Canadian company sought to export a product labelled as foie gras to the United States that was not from a "specially fed and fattened" duck or that lacked the requisite amount of liver from a "specially fed and fattened" duck, that product would be considered "adulterated" under USDA regulations and could not be lawfully imported to the United States. 21 U.S.C 453(g)(8); *see also* 9 C.F.R. 381.1(b) (a product is adulterated if it omits any valuable constituent part).

Despite the USDA's approval of foie gras for human consumption, the California law upheld by the Ninth Circuit bans the sale in California of any type of duck meat (including the liver) if the duck was specially fed and fattened before slaughter. *See* Cal. Health & Safety Code §25982 ("A product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size.") and § 25980 (defining "force feeding" as a "process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily.")

A duck obviously cannot be "specially fed and fattened" before slaughter, as required by the USDA in order to sell the liver as foie gras, unless the duck consumes more food than it normally would, which would violate the California statute. Conversely, any item in the USDA's FOOD STANDARDS AND LABELING POLICY BOOK that contains foie gras would be considered an adulterated product if the liver came from a duck that was not "specially fed and fattened." Given the conflicting requirements regarding the production of foie gras, it is impossible for Canadian foie gras producers to sell foie gras that complies with both California law and USDA regulations.

II. The Ninth Circuit's Decision Allows California to Ban Foie Gras Exports from Canada, Notwithstanding the USMCA Granting Access to the Entire United States Market for Canadian Poultry Products that Comply with USDA Standards.

Canada is one of just ten 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). To be eligible for export to the United States, Canadian poultry products must be processed at establishments located in Canada, that are certified as having met USDA requirements, and are subject to inspection by the USDA. Further, all poultry products imported from Canada are subject to USDA inspection, *see* 9 C.F.R. 381.199(a)(1), and may not be imported unless they are ". . . not adulterated, and contain no . . . ingredient which renders them . . . adulterated . . . and [unless] they comply with the regulations prescribed in this subpart to assure that they comply with the standards provided for in the [Poultry Products Inspection] Act." 9 C.F.R. 381.195(b).

Only if a Canadian producer complies with USDA regulations concerning the composition of foie gras products (e.g., requiring specific amounts of "specially fattened" liver), and processes those products at one of the establishments in Canada that is certified as having met USDA requirements to export poultry products, may its products be exported to the United States. Canadian foie gras that meets these requirements is listed as a specific article on

the Harmonized Tariff Schedule of the United States and can be imported duty-free to United States under the USMCA. *See* Harmonized Tariff Schedule of the United States (2022) rev. 12, Chap. 2, §0207.43.00.

Even though the USDA has enacted specific regulations concerning the composition and processing of poultry products imported into the United States, and the governments of Canada and the United States have negotiated the USCMA and listed foie gras as an article that can be imported to the United States from Canada duty-free, the Ninth Circuit in this case has effectively granted California a license to boycott Canadian foie gras – and any other poultry and meat product subject to USDA regulation.

In *National Meat*, this Court reiterated the broad preemptive sweep of federal regulation of meat products and held that a state could not ban the sale of meat derived from a non-ambulatory pig, where USDA regulations specifically permit the production and sale of meat from such animals. *Id.* at 465 ("According to the Court of Appeals, 'states are free to decide which animals may be turned into meat.' We think not.") (citation omitted). This Court also held that states may not use "sale bans" to indirectly regulate matters subject to express federal preemption under the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601. *Id.* at 464 ("That would

make a mockery of the FMIA's preemption provision.")[3]

Under the principles set forth in *National Meat*, just as California cannot ban the sale of meat from pigs that are non-ambulatory, it cannot ban the sale of meat from ducks (e.g., duck livers) that are fattened for slaughter, as USDA regulations require the slaughter of ducks that are specially fattened in order to make foie gras products. CA9.20-55882. Dkt. 30 at SER-210 (excerpt from USDA's FOOD STANDARDS AND LABELING POLICY BOOK).

Indeed, the principle of federal preemption as to what food may be sold in the United States long predates the express statutory preemption in the FMIA and PPIA. In *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898), this Court invalidated a state ban on the sale of margarine, because it was subject to federal inspection and authorized for sale under federal law. This Court held, "If Congress has affirmatively pronounced the article to be a proper subject of commerce, we should rightly be influenced by that declaration." *Id*. at 8.

If the Ninth Circuit's decision is left undisturbed, what is to stop a state or local government from

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[3] The preemption provisions in the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 467e, are identical to those in the FMIA, and as one Circuit Court of Appeals has noted, "[t]he legislative history of the two Acts and subsequent amendments indicate a congressional intent to construe the PPIA and the FMIA consistently." *Kenney v. Glickman*, 96 F.3d 1118, 1124 (8th Cir. 1996).

banning the sale of beef, pork, or chicken products (from Canada or elsewhere) because the animals, like the ducks from which foie gras is derived, are "specially fed and fattened" for slaughter, which is a common practice in food production? What is to prevent a state or local government from imposing its own regulations as to what meat or other foods can be sold or used as ingredients in USDA approved meat and poultry products?

Amicus curiae represents Canadian food producers who are not subject to USDA regulations but who voluntarily comply with those regulations on Canadian soil, solely to avail themselves of the opportunity to export their products to the United States. The governments of the United States and Canada have negotiated the USMCA to allow the duty-free passage of meat and poultry products ranging from brisket to processed ham to frozen chicken. *See* Harmonized Tariff Schedule of the United States (2022) rev. 12, Chap. 2. If, as the Ninth Circuit has now held, any state or local government can ban the sale of items covered by USDA regulations and the USMCA, should the government of Canada and/or Canadian food producers now negotiate trade agreements with individual states and countless local governments, rather than the federal government?

To avoid such a scenario, the petition should be granted, so this Court can consider the ramifications of the Ninth Circuit's ruling, which threatens to wreak havoc on Canadian food exports to the United States. Otherwise, Canadian foie gras producers will be forced to contend with conflicting state and federal

regulations and will have to exit the California market as a result. The next product that California might choose to regulate could be chicken, beef, or pork. Should Canadian producers, who comply with USDA regulations, be forced to exit the California market for those products too? Just as in *National Meat*, only this Court can resolve the preemption issue raised by Petitioners, and redress the conflict faced by Canadian food producers seeking to sell their products in California, which is the largest market in the United States.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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