No. 17-1285

IN THE
Supreme Court of the United States

ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC; HVFG LLC; AND HOT'S RESTAURANT GROUP, INC.,

Petitioners,

v.

XAVIER BECERRA, 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 a host of industry associations in the food production sector in Quebec. CTAQ 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). CTAQ represents its members' interests in foreign trade opportunities and government relations, including with the United States, Canada's largest trading partner.[2]

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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 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 Éleveurs de Canards et d'Oies du Québec (AECOQ), the Conseil des Vins du Québec (CVQ), the Association des Micro-

In 2016, more than $24 billion of food and beverage products were exported from Canada to the United States. Quebec alone exported more than $4 billion of food and beverage products, with more than 56% of these goods going to the United States. While foie gras exports are certainly significant to the Petitioners, foie gras products represent a very small portion of Canadian food exports.

The reason CTAQ has an essential interest in this case is because, as the Petition aptly put it, the California foie gras ban is the proverbial "canary in the coal mine" on the issue of whether state and local governments may enact regulations concerning food product specifications that are in addition to or different than United States Department of Agriculture ("USDA") regulations.

State and local sale bans on Canadian exports of poultry products that fully comply with USDA regulations violate the principle that federal standards on meat and poultry production preempt any additional or 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).

Distilleries du Québec (AMDQ), the Fondation Initia, and the Association des Négociants Embouteilleurs de Vins (ANEV).

By filing this amicus brief, CTAQ seeks to protect its members from the burden of complying with a patchwork of federal, state and local regulations, and having their food exports, which fully comply with USDA regulations, boycotted by state and local governments that impose additional or different requirements.

SUMMARY OF THE ARGUMENT

In order 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 to USDA inspection. The governments of the United States and Canada negotiated the North American Free Trade Agreement ("NAFTA"), 19 U.S.C. 3301 *et seq*., which allows various meat and poultry products, including foie gras, to pass duty-free from Canada to the United States.

The Ninth Circuit's decision in *Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017), 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 ban food products approved for sale and regulated by the USDA.

The result will be a variety of state and local laws that are in addition to or different from USDA standards. Canadian food producers and the government of Canada, which had previously relied upon trade agreements negotiated between the governments of the United States and Canada to determine what foods can be exported to the United States, will now be compelled to enter into trade agreements with individual state and local governments to ensure continued access to the United States market.

The petition for certiorari should be granted to address the issue of ingredient preemption, and, like this Court did in *National Meat,* to redress the different, additional, and conflicting ingredient definitions that Congress intended to preempt.

ARGUMENT

The Ninth Circuit's Decision Disrupts Trade by Subjecting Canadian Poultry Exports to State Regulations That Are in Addition to or Different from 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.[3] 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).

With respect to 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.Dkt. 14-2 at 20-21 (excerpt from USDA's FOOD STANDARDS AND LABELING POLICY BOOK). The USDA FOOD STANDARDS AND LABELING POLICY BOOK also sets forth ingredient requirements for 14 different poultry

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[3] There are hundreds processing plants in Canada that have elected to comply with USDA regulations so they can export their products to the United States. A list of these plants can be found on the USDA website at:

https://www.fsis.usda.gov/wps/wcm/connect/d7a50e4c-b91c-4018-b025-22a55c6604e1/Canada-establishments.pdf?MOD=AJPERES&ContentCache=NONE.

products containing foie gras, such as 'torchon style" foie gras, terrines, and parfaits. *Id.* at ER019-024. For each of these products, the USDA requires "minimum duck liver or goose liver foie gras content" ranging from 50%, 85%, or 100. *Id*. at ER020-024. If a Canadian company sought to export a foie gras product that was not from a "specially fed and fattened" duck, or lacked the requisite amount of "specially fattened" duck liver, 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).

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 imported 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 NAFTA. *See* Harmonized Tariff Schedule of the United States (2018) rev. 2 (posted March 29, 2018), 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 NAFTA 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.

The California law upheld by the Ninth Circuit bans the sale in California of a type of duck meat (the liver) if the duck was specially fed and fattened before slaughter. *See* Cal. Health & Safety Code § 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.") The USDA, however, has approved foie gras for human consumption, enacted regulations that *require* it to come from ducks that are "specially fed and fattened" before slaughter, *see* CA9.Dkt.14-2 at 20-21 (excerpt from USDA's FOOD STANDARDS AND LABELING POLICY BOOK), and further required that these ducks be processed at Canadian establishments that meet USDA standards.

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 consumption 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; emphasis added). 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.")[4]

Thus, 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.Dkt. 14-2 at 20-21 (excerpt from the USDA FOOD STANDARDS AND LABELING POLICY BOOK).

Indeed, the principle of federal preemption as to what food may be sold in the United States long

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[4] 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).

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 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? 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 NAFTA 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 (2018) rev. 2 (posted March 29, 2018), 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 NAFTA, should the government of Canada and/or Canadian food producers proceed to negotiate trade agreements with individual states and 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. Thus far, Canadian foie gras producers must contend with conflicting state and federal regulations, and will have to exit the California market as a result.[5] The next product that California might choose to regulate could be chicken,

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[5] The USDA requires that foie gras be produced from "specially fed and fattened" ducks. *See* CA9.Dkt.14-2 at 20-21 (excerpt from the USDA FOOD STANDARDS AND LABELING POLICY BOOK). California, however, prohibits the sale of duck liver from a duck that was subjected to a "process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily." Cal. Health & Safety Code § 25980. A duck obviously cannot be specially fattened for slaughter, as required by the USDA, unless it consumes more food than it normally would, which would violate the California statute. Canadian poultry producers should not be required to exit the market to resolve this conflict. *See Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472, 488 (2013) (rejecting the "stop-selling rationale" to resolve impossibility preemption scenarios).

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 avail themselves of the largest market in the United States.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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