No. 22O149

IN THE

Supreme Court of the United States

STATE OF INDIANA, *et al.*,

Plaintiffs,

v.

STATE OF MASSACHUSETTS,

Defendant.

On Motion for Leave to File a Bill of Complaint

BRIEF OF ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES DU QUÉBEC, HVFG LLC, AND HOT'S RESTAURANT GROUP, INC., AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

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INTERESTS OF *AMICI CURIAE*[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 USDA-approved foie gras products in the United States and raises ducks on its farm in New York. Hot's Restaurant Group, Inc., sells foie gras products in California made from ducks raised on farms in Canada and New York.

Amici have a vital interest in this case because they were the plaintiffs in *Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 397 (9th Cir. 2013) ("*Éleveurs I*"), a preliminary injunction appeal in which *amici* raised the same foundational issue of whether a State may restrain commerce in wholesome, USDA-approved agricultural products from other States and countries based solely on its dislike of the farming methods used by farmers outside its borders. In a flawed opinion that flouts this Court's dormant Commerce Clause precedents, the

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[1] This brief was authored by *amici* and their counsel of record, and no part was authored by counsel for any party. No one other than *amici* has made any monetary contribution to the preparation or submission of this brief.

Amici's counsel provided 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 to file this brief.

This brief is identical in all material respects to the brief being simultaneously submitted by *amici* in support of granting the motion for leave to file a bill of complaint in *Indiana et al. v. Massachusetts*, No. 22O149, which raises the same dormant Commerce Clause issue as in this case.

Ninth Circuit held that, if *amici* feed their ducks — back in Canada and New York — more food than California dictates, then California could close its market to their wholesome, USDA-approved poultry products. *Id*. at 950.

Amici later established on summary judgment that California's attempt to ban the sale of wholesome, USDA-approved poultry products containing foie gras is unconstitutional under the Supremacy Clause — as preempted by the federal Poultry Products Inspection Act (PPIA), which expressly preempts any "addition[al]" or "different" ingredient requirements imposed by any State. 21 U.S.C. § 467e. But the California Attorney General appealed, and the Ninth Circuit reversed and remanded. *Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017). (*Amici*'s petition for certiorari will be filed next month in No. 17A793.)

Here, the dormant Commerce Clause issue raised by the plaintiff States' bill of complaint is essentially identical to the issue that *amici* first raised in *Éleveurs I*. Depending on the final outcome of their preemption claim, the plaintiff States' original action thus may well have a direct impact on *amici*'s case. Moreover, beyond their own case, *amici* are interested in the natural functioning of the interstate market for USDA-approved agricultural products — free from meddling and unconstitutional State regulations — and this case presents the Court with an ideal opportunity to ensure this.

SUMMARY OF THE ARGUMENT

First they came for the foie gras. In 2004, a gaggle of California legislators got ahold of a video taken by animal rights activists showing the feeding of ducks to fatten their livers. California not only banned its own farmers from using this feeding practice, as was arguably within its power to do; it went much further and enacted a separate statute banning the sale of any product "if it is the result of" a farmer causing his ducks or geese to "consume more food than a typical bird" would consume voluntarily. Cal. Health & Safety Code §§ 25982, 25980(b). In *Éleveurs I*, the Ninth Circuit held that the California ban prohibited the sale of wholesome, USDA-approved poultry products from farmers who raised and fed their animals entirely in *other* States and countries.

Now they've come for the eggs. In 2015, after California voters imposed cage-size requirements on their farmers of egg-laying hens, the California Legislature enacted a ban on the sale of wholesome, USDA-approved eggs from *other* States if the farmers in those other States have not built their hens' cages to California's particular standards.

And soon they're coming for the pork, too. In 2016, Massachusetts enacted a law that, effective as of 2022, will prohibit the sale of wholesome, USDA-approved pork in that State if farmers in *other* States do not raise their pigs in pens that comply with California's specifications. (See *Missouri et al. v. California*, No. 22O148.)

What these laws have in common is their attempt by one State to erect trade barriers to wholesome, USDA-approved agricultural products based solely on how the animals from which those products were produced had been treated in *other* States (and countries). These laws also share a common element with two troubling Ninth and Tenth Circuit cases that upheld restrictions on the sale of energy from out-of-state if not produced in the ways that California or Colorado prefers. And these cases all defy this Court's established dormant Commerce Clause doctrine.

Yet, as this Court has most recently reiterated: "The 'common thread' among those cases in which the Court has found a dormant Commerce Clause violation is that the State interfered with the natural functioning of the interstate market, either through prohibition or through burdensome regulation." *McBurney v. Young*, 133 S. Ct. 1709, 1720 (2013) (internal citation and quotation omitted). Unless this Court takes up the plaintiff States' case, California and the other States who follow its lead will continue to restrain interstate and foreign commerce in wholesome products merely because they disfavor the production methods that were used to produce them — even far beyond their borders.

This case and the related original action in this Court by the State of Missouri and 12 other States against California (No. 22O148) present an ideal opportunity for the Court to resolve this foundational issue of federalism.

ARGUMENT

I. The Court Should Grant Leave to the Plaintiff States to File Their Bill of Complaint Because the Dormant Commerce Clause Issue It Presents Is of National Importance to All Farmers and Agricultural Producers.

When one State tries to legislate the production methods to be used by producers in other States as a condition to the sale of their commodity products, it violates the basic principle that — in the free-trade area known as the United States — no State may close its market to interstate commerce in an effort to project its legislation into another State. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (striking statute that conditioned sale of milk in New York on price paid to producers outside the state because "New York has no power to project its legislation into Vermont"). Even the Ninth Circuit has previously acknowledged the danger that this Court's dormant Commerce Clause doctrine was designed to deter. "The Commerce Clause … was included in the Constitution to prevent state governments from imposing burdens on unrepresented out-of-state interests merely to assuage the political will of the state's represented citizens." *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 998 (9th Cir. 2002).

This Court has made unmistakably clear that "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C & A Carbone, Inc. v. Town of*

Clarkstown, N.Y., 511 U.S. 383, 393 (1994); U.S. Const. art. I, sec. 8, cl. 3 (conferring on Congress the power to "regulate commerce . . . among the several states"). Yet that is exactly what California is doing to the pig farmers in this case, to the egg-laying hen farmers in *Missouri v. California*, and to the duck and goose farmers in *amici*'s case. This Court should take up this case to reinforce the basic American notion that one State "may not insist that producers in other States surrender whatever competitive advantages they may possess." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 580 (1986).

Over 100 years ago, in *Schollenberger v. Com. of Pa.*, 171 U.S. 1 (1898) — a decision that remains binding to this day — this Court invalidated a state ban on the sale of another federally-approved product that was controversial at the time: oleomargarine. "If [C]ongress has affirmatively pronounced the article to be a proper subject of commerce, we should rightly be influenced by that declaration." *Id.* at 8. Congress had provided for federal inspection of oleomargarine, *id.* at 8-9, just as it has done for foie gras products through the PPIA, for egg products through the EPIA, and through pork products through the FMIA. This Court rightly held, "[W]e yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated, and which in its pure state is healthful." *Id.* at 14. It should now take up the plaintiff States' original action and give effect to this salutary holding.

Even beyond the realm of agricultural products, States are ignoring this Court's teachings — including with the recent imprimatur of the federal courts of appeals. In *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), California limited the sale of ethanol based on the carbon-producing impact of its production in *other* States and countries. Analyzing whether the statute constituted an impermissible extraterritorial regulation, the Ninth Circuit recognized that, "[u]nder *Healy*, the 'critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundary of the state.'" *Rocky Mountain*, 730 F.3d at 1101 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)). Yet the Ninth Circuit remarkably concluded that it did not. *Id.*

In their dissent from the denial of en banc review in *Rocky Mountain*, seven judges wrote, "Now, the dormant Commerce Clause has been rendered toothless in our circuit, and we stand in open defiance of controlling Supreme Court precedent." 740 F.3d 507, 519 (2014). As this Court has explained, "The Commerce Clause … precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Unfortunately, in light of the growing trend of States deviating from the controlling principles set forth in *Healy*, this Court should hear this case and explain these concepts once again.

In *Energy and Environment Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015), Colorado restrained commerce in electricity from power plants in other States by limiting the supply from producers who generate energy *outside* the State and upload that electricity to an interstate grid. Yet the Tenth Circuit condoned this even though the "physical electricity generated by the renewable sources and supplied to the grid is indistinguishable from the physical electricity generated by nonrenewable sources and supplied to the grid." *Id.* at 9-10.

In the case of the *amici* poultry farmers — whose foie gras products were the target of a California statute regulating the feeding of ducks and geese — California restrains commerce by outright banning the sale of wholesome, unadulterated poultry products in California based *solely* on whether the farmers in New York and Canada use an agricultural method that California handicaps its own farmers from using to feed their own ducks. *See* Cal. Health & Safety Code §§ 25981, 25982. Just like with the pork issue today, California's purported interest was in preventing the ducks from undergoing what it perceived to be animal cruelty — even though the animals are raised and turned into USDA-certified products *entirely* outside California. Such legislation is offensive to other States, each of which has its own laws against animal cruelty. If any of the farm animals at issue in these cases feel any discomfort, they do so far beyond California's borders — and thus far beyond the State's legitimate legislative reach.

This case therefore questions whether these kinds of production method-based restraints on interstate commerce violate the principles in this Court's dormant Commerce Clause jurisprudence. The answer is that they do. This Court clearly reaffirmed in *Healy* its "established view" 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." 491 U.S. 324, 332 (1989).

If the States are not directed to adhere to this Court's jurisprudence on the limits of extraterritorial regulation, then they will continue to engage in overreach whenever a legislature disfavors the way in which something is made. Indeed, the consequences of these dormant Commerce Clause decisions have not gone unnoticed even by mainstream journalists. As one writes, "Normally, the Constitution prohibits such shenanigans." Dan Fisher, *California Reaches Beyond Its Borders With Rules, From Ethanol to Eggs*, FORBES.COM, Dec. 20, 2013, last viewed at http://www.forbes.com/sites/danielfisher/2013/12/20/california-reaches-beyond-borders-with-its-rules-from-ethanol-to-eggs/.

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It is time for this Court to rein in the attempts by a few States to restrain commerce from the rest of the Nation, and this case — involving over a dozen States themselves — presents an excellent vehicle to do so.

CONCLUSION

For the foregoing reasons, the plaintiff States' motion for leave to file a bill of complaint should be granted.

Respectfully submitted,

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