Nos. 13-1148, 13-1149

IN THE

Supreme Court of the United States

ROCKY MOUNTAIN FARMERS UNION, *et al.*,

Petitioners,

and

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,

Petitioners,

v.

RICHARD W. COREY, IN HIS OFFICIAL CAPACITY AS EXECUTIVE OFFICER OF THE CALIFORNIA AIR RESOURCES BOARD, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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 PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Association des Éleveurs **de Canards et d'Oies du Québec** is an association of the leading duck and goose farmers in Quebec, Canada. **HVFG LLC**, known as Hudson Valley Foie Gras, raises ducks on its farm in New York and is the largest producer of foie gras products in the United States. **Hot's Restaurant Group, Inc.**, operates a restaurant in Hermosa Beach that, until a California production-method ban took effect on July 1, 2012, sold dishes containing foie gras from ducks raised on farms in Canada and New York.

Amici have a vital interest in this case because *amici* are currently plaintiffs in a similar pending action against Respondent Kamala D. Harris in her official capacity as Attorney General of California involving the same foundational issue of whether one State may restrain commerce in wholesome products from other States and countries based solely on its dislike of the production methods used by farmers *in those other* States and countries. *See Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 397 (9th Cir. 2013).

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1. This brief was authored by *amici* and their counsel listed on the front cover, and was not authored in whole or in part by counsel for any party. No one other than *amici* or their counsel has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, all parties were notified ten days prior to the due date of this brief of the intention to file. All parties have consented to the filing of this brief, and their written consent either is already on file with this Court or is submitted with this brief.

As it did in this case, the Ninth Circuit ordered the Attorney General to provide a response to *amici's* petition for rehearing en banc, and — no doubt in recognition of this overlapping issue — the Ninth Circuit delayed ruling on *amici*'s petition until just days after it issued its controversial denial of rehearing en banc in this case. *Amici* will soon be filing a petition for a writ of certiorari in this Court, which will present an even better vehicle to address this foundational constitutional issue and to bring the Ninth Circuit into compliance with this Court's precedents under the Commerce Clause.

SUMMARY OF THE ARGUMENT

A simple riddle illustrates why the Court should grant the petition in this case on the issue of extraterritorial regulation — and likewise grant the forthcoming petition for certiorari in *amici's* related case:

> What does pure ethanol made from corn milled by farmers in Colorado and New Mexico have in common with wholesome foie gras made from ducks fed by farmers in Canada and New York?

The answer is that, unless this Court grants certiorari and reverses, the Ninth Circuit will continue to allow California to restrain interstate and foreign commerce in the markets for both of these unadulterated products merely because the California Legislature disfavors the agricultural practices that — far beyond California's borders — the out-of-state farmers use to produce them.

ARGUMENT

I. THE NINTH CIRCUIT'S "OPEN DEFIANCE" OF THIS COURT'S PRECEDENTS ON EXTRATERRITORIAL REGULATION IS UNDERMINING INTERSTATE COMMERCE AND CREATING CONSTITUTIONAL CHAOS IN *AMICI*'S PENDING CASE.

In the case of the corn farmers whose ethanol is the target of the regulations at issue here, California restrains commerce by assigning a higher carbon-intensity score to their ethanol based on a host of factors, including the method used to mill the corn outside the State. California's purported interest is in hoping to reduce global carbon emissions — even if those carbon emissions occur in other States and countries. And even if California's own Air Resources Board has acknowledged that this scheme will ultimately have "little or no net change in fuel carbon-intensity on a global scale." Pet. RMFU ER7:1687.

In the case of the *amici* duck farmers — whose foie gras the Ninth Circuit says is a subject of a California statute regulating the feeding of birds — California restrains commerce by outright banning the sale of high-value poultry products based *solely* on whether they were produced using an agricultural method that California prevents its own farmers from using to feed *their* ducks. *See* Cal. Health & Safety Code §§ 25980 *et seq.* (banning use of "a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily"). California's purported interest is in preventing what it perceives to be animal cruelty — even if the ducks are fed, slaughtered, and turned

into USDA-certified poultry products *entirely* outside California. And even if California's own Department of Food and Agriculture has acknowledged that modern foie gras production "does not involve cruelty at any time."[2]

Regardless of how grandiose California's aims may be, the Commerce Clause — which reserves matters of interstate and foreign commerce to Congress — does not allow this form of extraterritorial regulation. 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). In spite of this basic principle of federalism, two of the three judges on the Ninth Circuit panel below saw no problem with how the LCFS penalizes farmers for their activities in other states — with one of them cheering that, "[I]f California's experiment with the LCFS is to succeed in inducing increased production of alternative fuels and/or decreased carbon impact of existing fuels, *the sooner it can proceed, the better*[.]" Pet. RMFU App. 156a (emphasis added). In *amici*'s case, the Ninth Circuit panel likewise

2. There is no dispute here that the LCFS regulations were intended to apply to ethanol produced outside California. At the same time, in opining on the constitutionality of the statute at issue in *amici*'s case, the Ninth Circuit simply *assumed* that the law was intended to ban the sale of wholesome foie gras products "regardless of where the force feeding occurred," with the court remarkably concluding, "Otherwise, California entities could obtain foie gras produced out-of-state and sell it in California." *Association des Éleveurs*, 729 F.3d at 949. Unless and until a California appellate court construes the statute otherwise, the Ninth Circuit's ruling raises the very same issue of California's extraterritorial overreach.

had no qualms about a statute that forces New York and Canadian farmers to give up a millennia-old but often misunderstood feeding method as a condition to the sale of their wholesome, USDA-inspected poultry products in California. The panel's presiding judge mused aloud at oral argument, "Well, we're cruel[] to the cattle that we slaughter here, aren't we . . . and chickens . . . that never see the light of day?" (*See* http://cdn.ca9.uscourts.gov/datastore/media/2013/05/08/12-56822.wma [audio file] at 20:18.)

But when one State tries to dictate the production methods to be used by farmers in other States as a condition to the sale of their products, the constitutionality of that law should not depend on the desires of any particular jurist. This Court has made that unmistakably clear. "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); *see also Conservation Force, Inc. v. Manning*, 301 F.3d 985, 998 (9th Cir. 2002) ("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.").

Yet that is exactly what the Ninth Circuit has endorsed here. The opinion of the panel majority effectively tells corn farmers in the Midwest that their ethanol will only be welcome in California if they figure out a way to produce it (and transport it into the State) without emitting more carbon back home than California would prefer. Likewise, in *Association des Éleveurs*, the Ninth Circuit tells *amici* that California can wall off its market — the largest in

the Union — to their wholesome, unadulterated, USDA-certified poultry products unless they change the way they raise their livestock back home, but that this somehow does not offend the Commerce Clause because the *amici* farmers "may force feed birds to produce foie gras *for non-California markets*." *Association des Éleveurs*, 729 F.3d at 950 (emphasis added).

In their dissent from the denial of en banc review here, seven judges on the Ninth Circuit got it right when they wrote, "Now, the dormant Commerce Clause has been rendered toothless in our circuit, and we stand in open defiance of controlling Supreme Court precedent." Pet. RMFU App. 172a. 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, because the Ninth Circuit refused to review this issue en banc in either petitioners' or *amici*'s case, this Court is going to have to explain these concepts once again.

This Court should therefore grant the petition for certiorari.

II. IF THE COURT GRANTS CERTIORARI IN THIS CASE, IT SHOULD GRANT *AMICI*'S FORTHCOMING PETITION ON THE SAME ISSUE INVOLVING THE EXTRATERRITORIAL REGULATION OF LIVESTOCK PRODUCTION — AS *AMICI*'S CASE PRESENTS AN EVEN BETTER VEHICLE FOR CERTIORARI.

The RMFU petition in this case includes multiple citations to the Ninth Circuit's published opinion in *amici*'s case. As noted in the petition, "The Ninth Circuit has now blessed California legislation barring or penalizing imports based on their mode of production in other States — not only in this case, but at least once more." Pet. RMFU 22 (citing *Association des Éleveurs*). In fact, in light of the reasoning of the Ninth Circuit in petitioners' and *amici*'s case, *amici*'s ducks are now the proverbial canaries in the coal mine. As petitioners aptly note:

> California alone has already enacted potentially extraterritorial legislation related to methods of production of foods ultimately sold in California. *See Association des Eleveurs*, 729 F.3d 937 (foie gras); *see also* Cal. Health & Safety Code § 25996 (eggs). There is no telling what might come next, in California or elsewhere, now that the practice has received the Ninth Circuit's approval.

Id. "By the same logic, a State with California's market power could adopt any number of policies on virtually any social and economic policy issue." *Id*. at 34.

Can California — consistent with the Commerce Clause — limit the sale of pure ethanol from the Midwest in the hope of reducing greenhouse gas emissions there? Even more pointedly, can California completely ban the sale of poultry products like foie gras from Hudson Valley and farmers in Quebec in the hope of reducing any imagined discomfort felt (if at all) thousands of miles away by ducks in New York and Canada? If the Ninth Circuit is not directed to adhere to this Court's jurisprudence on the limits of State-on-State regulation, then its published opinions in this case and in *Association des Éleveurs* will serve as a green-light for all such extraterritorial overreaching. Indeed, the same flawed reasoning would allow a state or city to ban the sale of dairy products from out-of-state cows that produce too much methane — or, in the language of the statute at issue in *amici*'s case, from out-of-state cows that were made to produce more milk than a typical cow would produce voluntarily.

Measured in dollars (as opposed to man's culinary pleasure), the market for ethanol is certainly larger than that for foie gras. But *amici*'s case provides a superior opportunity for this Court to squarely address the Constitution's limits on the authority of one State to impose its political will on producers in other States. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (striking statute that conditioned sale of milk in New York based on price paid to producers outside the state because "New York has no power to project its legislation into Vermont"). There are at least four compelling reasons why, if the Court grants the petition in this case, it should grant *amici*'s forthcoming petition on the same issue.

First, while the restriction at issue in this case is the assignment of a higher carbon-intensity score to certain

fuels from outside California based on the method used to produce them — which at least still allows their sale in California — the restriction in *amici*'s case is a more direct burden on commerce because it operates as a total *ban* on the sale of wholesome poultry products from Canada and New York if the animals were fed in a way that California frowns upon.

Second, while the production method used by ethanol producers in the Midwest is just one of many parameters that factor into the complex calculation of a fuel's carbon-intensity score, the ban on poultry products in *amici*'s case is based *solely* on the farming method used by agricultural producers in other states and countries.

Third, while the products affected here include alternative fuels that supply energy to Americans' cars and other machinery, *amici*'s case involves the attempted regulation of products in the American food supply — and, in particular, a ban on federally-approved poultry products that are inspected by the USDA and deemed fit for distribution in interstate commerce. (Foie gras itself is one such product, but such a law could just as readily be applied to the nine billion chickens slaughtered annually in the United States for human consumption.)

Finally, while the LCFS regulations are aimed at reducing the effects of carbon emissions that may transcend state boundaries, there is no question that *amici*'s ducks are all bred, fed, slaughtered, and turned into poultry commodities *entirely* outside California. California has no legitimate local interest in telling New York and Canadian farmers how to raise their animals — especially when the farmers are subject to strict laws against animal cruelty in their own state and province.

Thus, if the Court grants the petition here, it should *a fortiori* grant the petition in *amici*'s case.

* * *

Whether in this case or in *amici*'s — or in both — the time to make clear whether this Court meant what it said in *Healy*, *Baldwin*, and *Brown-Foreman* is *now,* before the Ninth Circuit's opinions in this case and in *amici*'s case lead other courts and State legislatures to further defy this Court's precedents.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition for certiorari, the petition in this case should be granted — as should *amici*'s forthcoming petition for certiorari in its own right.

Respectfully submitted,

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