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 *AMICI CURIAE* REASON FOUNDATION AND MANHATTAN INSTITUTE FOR POLICY RESEARCH IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting economic freedom and limited government.

Amici have a vital interest in this case because it involves questions concerning federal and state regulation, the national economy, the free market, and food freedom. Given both the essential nature of food

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

in Americans' daily lives and growing regulatory threats to agricultural and food producers, *amici* believe states should not and may not impose unwarranted burdens on interstate commerce in food.

SUMMARY OF THE ARGUMENT

Restrictions on the free flow of goods between states are exactly the sort of interstate trade barriers that the federal Constitution was intended to prohibit. Section 25982 of the California Health and Safety Code prohibits the sale in California of a wholesome food ingredient in contravention of the PPIA and regulates extraterritorial conduct in violation of the dormant Commerce Clause. The law also poses a grave challenge to the future of food and agriculture in this country. The Ninth Circuit's upholding of § 25982 could undermine our national markets in food and decide ultimately whether all future meat production will be outlawed in America. For these reasons, this Court should grant the petition for certiorari.

ARGUMENT

I. The PPIA Preempts California from Imposing Additional or Different "Ingredient Requirements" on Foie Gras

A. The PPIA establishes poultry "ingredient requirements" and preempts states from imposing additional ingredient requirements.

In 1957, Congress passed the Poultry Products Inspection Act ("PPIA"). Pub. L. No. 85–172 (Aug. 28, 1957) (codified at 21 U.S.C. § 451 *et seq*.). The law directed the U.S. Department of Agriculture ("USDA") to provide for compulsory inspection of poultry products to be purchased by American consumers in order to ensure the wholesomeness of those products. *Id*. The PPIA's regulatory oversight includes poultry products made "wholly or in part from" a duck. *See* 21 U.S.C. §§ 453(e) & (f).

In 1968, Congress amended the PPIA by passing the Wholesome Poultry Products Act ("WPPA") Pub. L. No. 90–492 (Aug. 18, 1968). In pertinent part, the WPPA made two notable additions to the PPIA. First, the WPPA added a new section to the PPIA, § 23, which outlined the PPIA's responsibility for regulating the "[m]arking, labeling, packaging, or ingredient requirements" for poultry.[2] *Id*. Second, and relatedly, the WPPA added an express preemption provision that prohibits states from imposing any such

[2] The relevant part of that law is codified at 21 U.S.C. § 467e.

"requirements . . . in addition to, or different than, those made under this chapter[.]" 21 U.S.C. § 467e.

Foie gras, the French term for "fatty liver," is an ingredient made from the liver of a goose or duck that has been enlarged beyond its normal size. *See*, *e.g.*, Mark Caro, *Foie Gras, in* 1 OXFORD ENCYCLOPEDIA OF FOOD & DRINK IN AMERICA 774 (Andrew F. Smith ed., 2013). Section 25982 of the California Health & Safety Code, adopted in 2004 and implemented in 2012, bans the sale of products that are "the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." Cal. Health & Safety Code § 25982.

The parties in the instant case agree the PPIA preempts states from establishing "ingredient requirements" that differ from or are in addition to the PPIA's ingredient requirements. *See Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140, 1146 (9th Cir. 2017). The question the instant case presents, then, is whether the PPIA's express preemption of additional or different state-established "ingredient requirements" preempts California's ban of the sale of foie gras. If California's sales ban imposes "ingredient requirements" that are "in addition to, or different than" the PPIA's requirements, then § 25982 is unconstitutional and is preempted by the PPIA. *See Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, 79 F. Supp. 3d 1136, 1144 (C.D. Cal. 2015) ("[T]he PPIA preempts § 25982 if a sales ban on poultry products resulting from force feeding a bird imposes an ingredient requirement that is in addition to or different than those imposed by the PPIA."). The instant case further

presents the question whether California's sales ban is preempted by the PPIA because the state's proscription of the only federally defined method of producing foie gras makes it impossible to comply with both state and federal ingredient requirements. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

B. Foie gras is a poultry ingredient made from the livers of "force fed" ducks and geese.

The process of feeding ducks or geese through a tube is an essential step in the ancient method of fattening the livers of these birds to produce the ingredient foie gras. The method of producing this ingredient is known by its French name, *gavage*. *See*, *e.g.*, Caro, *Foie Gras*.

Beginning in the 1960s, many cookbooks available in the United States began to highlight foie gras as an essential ingredient in French *haute cuisine*. *See generally e.g.*, Julia Child, FROM JULIA CHILD'S KITCHEN (1975) (describing various recipes that include the ingredient); Auguste Escoffier, MA CUISINE (1966) (detailing more than a dozen recipes that feature various foie gras ingredients, including whole lobe and sliced foie gras); Julia Child, 1 MASTERING THE ART OF FRENCH COOKING (1961)(introducing Americans to foie gras).[3] The growing popularity of foie gras in the United States

[3] The popularity of foie gras has only grown since that time. *See, e.g.*, Thomas Keller, THE FRENCH LAUNDRY COOKBOOK 104 (1999) (describing foie gras, which the renowned chef and author uses in many dishes, as "an expensive ingredient").

during this period likely spurred the governments of France and the United States to engage in negotiations over the essential ingredients and their percentages in the 1970s. These negotiations resulted in the establishment of joint ingredient requirements for foie gras and foie gras products. *See* Petition at 9.

More recently, shortly after California adopted § 25982, the USDA defined foie gras in its *Food Standards and Labeling Policy Book* ("Book"). *See generally* U.S. Dept. of Agric., Food Standards and Labeling Policy Book (Aug. 2005), *available at* https://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf. Notably, the Book is issued by the USDA's Food Safety & Inspection Service ("FSIS"), the same branch of the USDA responsible for enforcing the PPIA. In general, the Book contains important guidance around the relevant "ingredient requirements" for various foods regulated by the USDA under the PPIA and other laws. *See id*.

The Book defines foie gras "as obtained exclusively from specially fed and fattened geese and ducks." *Id*. The Book also declares that foie gras pate must contain at least 50 percent liver. *Id*. The USDA's definition of foie gras is clear. Under USDA's interpretation of its own regulations, just as chicken breast from chickens raised without antibiotics is an 'ingredient' in chicken nuggets, so too is duck liver from force-fed ducks an 'ingredient' in foie gras products. *See* FSIS Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submission, 81 Fed. Reg. 68933 (Oct. 5, 2016). Yet the Ninth Circuit determined

that § 25982, which imposes additional and differing ingredient requirements on a poultry ingredient that necessarily causes foie gras to be subject to the PPIA, namely livers obtained from a "force fed" duck or goose, does not violate the PPIA's preemption provision.

C. This Court ruled unanimously in favor of preemption in an analogous recent case, *National Meat Association v. Harris*

Though the PPIA has been in place now for more than five decades, this Court has not yet had an opportunity to rule on the law. But in this Court's clear ruling in *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012), which centered on a federal law analogous to the PPIA—the Federal Meat Inspection Act ("FMIA")[4]—the Court held unanimously that the FMIA preempted a California law analogous to § 25982.

In *National Meat Ass'n v. Brown*, 599 F.3d 1093 (9th Cir. 2010), the Ninth Circuit had ruled that the FMIA allowed California to prohibit certain animals from being subject to slaughter and sale as meat. This Court rejected that reasoning outright. In a 9–0 ruling, this Court struck down the California prohibition on the slaughter and sale of certain animals and held that states are not free to decide which animals may be slaughtered for sale as meat where the state law regulates or runs "smack into" federal law. 565 U.S. 452 at 467.

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[4] 21 U.S.C. § 601 *et seq*.

Just as the FMIA does for meat and meat products, the PPIA regulates not just the inspection, but—as even the Ninth Circuit has long recognized—also the *sale* of poultry and poultry products. *See National Broiler Council v. Voss*, 44 F.3d 740, 743 (9th Cir. 1994) (per curiam) ("The PPIA regulates the distribution and sale of poultry and poultry products[.]"). Like the FMIA, the PPIA is a pervasive regulatory scheme, and its preemption clause does not lend itself to the narrow interpretation given it by the Ninth Circuit. *Compare National Meat Ass'n*, 565 U.S. 452 at 459 (finding the FMIA's preemption clause "sweeps widely"), *with* 870 F.3d 1140. *See also* 79 F. Supp. 3d 1136, 1144 (finding the PPIA's preemption clause "sweeps broadly").

This Court ruled in *National Meat Ass'n* that dressing up the regulation of slaughter facilities in the costume of a sales ban, as California has done with § 25982 as concerns poultry processing facilities, is akin to putting lipstick on a pig and would "make a mockery" of the relevant preemption provision.[5] In the instant case, the majority in the Ninth Circuit found that § 25982 was not preempted on the reasoning of *National Meat Ass'n* because the sales ban "works at a remove" from farming and slaughterhouse activities. *Association des Éleveurs de Canards et d'Oies du Quebec v. Bonta*, 33 F.4th 1107, 1115 (9th Cir.

[5] *See* 565 U.S. 452 at 464 ("[I]f the sales ban were to avoid the FMIA's preemption clause, then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the FMIA's preemption provision.").

2022)(quoting *National Meat Ass'n*, 565 U.S. 452 at 467). However, Judge VanDyke recognized in his dissent that "§ 25982 is in fact *more* intrusive on the foie gras sellers than the slaughterhouses in *National Meat*." 33 F.4th 1107 at 1125. Judge VanDyke found that "California's § 25982 *overtly* regulates the process by which saleable foie gras can be produced." *Id*. at 1126. *Amici* support the dissent's conclusion that the majority's argument is "no different than the one the Supreme Court considered and rejected in *National Meat*." *Id*. This Court was correct to reject the Ninth Circuit's reasoning in *National Meat Ass'n* and should grant the petition in the instant case in order to do the same. *See* Rule 10(c) (stating as a compelling reason for granting review a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

D. Because the California statute imposes additional and differing ingredient requirements on foie gras, § 25982 is preempted by the PPIA.

Federal preemption of state law is an appropriate tool for courts to wield when a state seeks to impose unwarranted burdens on the national economy in an area already subject to a federal law that contains an express preemption provision. Federal laws that are intended to facilitate commerce in food, including the FMIA and PPIA, take precedence over (and are preferable to) state laws such as § 25982 that conflict with federal law by prohibiting such commerce. When such conflicts arise, federal preemption acts as a vital bulwark against "unwarranted and inconsistent state interferences with the national economy[.]" *See*

Richard A. Epstein & Michael S. Greve, *Introduction: Preemption in Context* 1, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Epstein & Greve eds. 2007).

The record below has established that the only way to make foie gras that complies with the federal definitions and requirements is through the feeding process of *gavage*, which specially fattens the bird's liver. Section 25982 is expressly preempted by the PPIA because Petitioners' foie gras products comply with all of the PPIA's requirements—but still violate § 25982 because their products contain an ingredient prohibited by § 25982: foie gras from ducks that have been "force-fed." Though the PPIA could establish different or additional ingredient requirements, such as requiring foie gras products to be made from the livers of birds that are not "force fed," the PPIA contains no such requirements. 79 F. Supp. 3d 1136 at 1145 ("It is undisputed that the PPIA and its implementing regulations do not impose any requirement that foie gras be made with liver from non-force-fed birds."). Consequently, § 25982 is expressly preempted because it imposes an ingredient requirement *in addition to* and *different than* that required by the PPIA.

Section 25982 is further preempted because California law mandates that foie gras not include force-fed products and federal law requires foie gras to be produced by force-feeding, making it impossible to comply with both. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Untroubled by this conflict, the Ninth Circuit majority concludes that "the sellers can still force feed birds to make their products.

They just cannot sell those products in California." 33 F.4th 1107 at 1114. However, such a "stop-selling" theory has not only been rejected by this Court in *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472 (2013), but it contravenes the principles of federalism embodied in the Supremacy Clause of the U.S. Constitution and this Court's other preemption jurisprudence. The solution is not for foie gras producers—or any other agricultural producers—to withdraw from the market in a given state when the state's regulations are incompatible with federal requirements. Rather, the state law must yield. Section 25982 is thus preempted by the PPIA.

II. Like the Statute in *National Pork Producers Council v. Ross*, § 25982 Is an Extraterritorial Regulation and Violates the Dormant Commerce Clause

Amici agree with the Petition's arguments regarding § 25982 as an unconstitutional extraterritorial regulation. California's sales ban unduly burdens the interstate market for a wholesome poultry product without serving a legitimate local interest. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Ninth Circuit majority in the instant case relied on the court of appeals' decision in *National Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021), *cert. granted* 212 L. Ed. 2d 402, 142 S. Ct. 1413 (2022), which is now under review before this Court in *National Pork Producers Council v. Ross*, No. 21-468 (NPPC). *Amici* agree that this Court should grant the Petition or hold it, pending the Court's decision in NPPC.

III. Upholding § 25982 Could Serve to Prohibit Most Future Domestic Meat Production and Consumption

The outcome of the instant case will determine the future of foie gras sales in California. But the instant case is about so much more than foie gras. The Ninth Circuit's precedential opinion could decide the fate of meat production involving the slaughter of live animals in America.

A. The PPIA specifically (and federal agricultural policy generally) seeks to facilitate markets in poultry products.

The PPIA serves two main purposes. First, the PPIA seeks to prevent the introduction into commerce of "[u]nwholesome, adulterated, or misbranded poultry products" that would harm poultry consumers. 21 U.S.C. § 451. Second, the PPIA seeks to guard against factors that could "destroy markets" for such wholesome, unadulterated, and properly branded poultry products. *Id*. These goals are deeply ingrained in the mission and purpose of the USDA itself. See, e.g., U.S. Dept. of Agric., *USDA Strategic Goals* 2018–2022, https://www.usda.gov/sites/default/files/documents/usda-strategic-goals-2018-updated-1.pdf (describing the USDA's strategic goals to "maximize the ability of American agricultural producers to prosper . . . [p]romote American agricultural products and exports. . . [and p]rovide all Americans access to a safe, nutritious, and secure food supply"). More broadly, both the federal Constitution and America's

national economic policy seek to foster and facilitate commerce between and among the states.[6]

B. California's agricultural policies are beginning to "destroy markets" in food.

When it comes to food and agriculture, California is truly unique among our states. On the one hand, no state's food and agriculture contributes more to the national economy than does that of California. On the other hand, in recent years no state has obstructed commerce in food and agricultural products to the extent California has done. This trend has troubling implications:

> California's turn against food is worrisome across the country . . . since in addition to its place as the nation's breadbasket and culinary trendsetter, California is the country's cultural and regulatory bellwether. Regulations passed in California often become laws elsewhere, at both the state and federal level. Companies that can no longer market a food in California may be forced to decide whether that product—robbed of twelve percent of [the U.S.] market—is still viable.

Baylen J. Linnekin, *The "California Effect" & the Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State &*

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[6] *See* U.S. Const. art. I, § 8, cl. 3 (declaring Congress's plenary power over the regulation of interstate commerce); *United States v. Lopez*, 514 U.S. 549, 574 (1995) ("[W]e have a single market and a unified purpose to build a stable national economy."). The federal Constitution further establishes the supremacy of federal law over conflicting state law. U.S. Const. art. VI, cl. 2.

the Nation, 13 CHAPMAN L. REV. 357, 358 (2010) (internal citations omitted).

California's foie gras ban is a primary example of a food or agricultural law that erects unconstitutional obstacles and barriers to the national food economy. But the law does not stand alone. Other recent California laws evidence both a comparable intent and impact. Worse still, other states have begun to follow California's lead, passing laws that pose similar challenges to the existence of the national food economy.

In 2008, for example, California adopted a law that requires poultry eggs, pork, and veal sold in the state to come exclusively from animals that were not confined within traditionally-sized enclosures. Cal. Code Regs. § 1350. At the time it was adopted, the law applied only to in-state producers. Subsequently, the state, in 2010, passed a law that expanded the 2008 law to eggs traveling in interstate or foreign commerce. Cal. Health & Safety Code § 25996. In enacting the California egg ban, the legislature relied on the very statute at issue in this case. *See* Cal. Sen. Rules Comm. Floor Analysis to AB 1437 (June 16, 2010). In 2016, Massachusetts adopted a similar law, which also applies to out-of-state and foreign producers. *See* Mass. Gen Laws. Ann. ch. 129 app. at § 1–1.

In 2017, Missouri and twelve other states sued California in this Court to overturn the state's ban on the sale of wholesome, USDA-approved eggs. *Missouri v. California*, No. 220148 (Filed Dec. 4, 2017). In a separate suit filed in this Court soon after, Indiana

joined a dozen states—including many that had sued California—to sue Massachusetts in order to overturn its law. *Indiana v. Massachusetts*, No. 220149 (Dec. 8, 2017) ("Massachusetts's attempt to impose regulatory standards on farmers from every other state by dictating conditions of housing for poultry, hogs, and calves when their products will be offered for sale in Massachusetts."). This Court invited the views of the Solicitor General in both cases, but ultimately denied leave to file bills of complaint.

Currently before the court is *National Pork Producers Council v. Ross*, No. 21-468, which pits the National Pork Producers Council and the American Farm Bureau Federation, representing the nation's leading pork producers—who raise, slaughter, and process meat from pigs for sale across the country—against the state of California.

After this Court agreed to hear the appeal, that ballot measure, Proposition 12, was adopted in 2018 by nearly two-thirds of California voters. Proposition 12 prohibits confining livestock "in a cruel manner" and requires livestock animals whose meat, offspring, or eggs will be sold in California to be confined in spaces large enough that they have sufficient room to lie down, turn around, or spread their wings. Those found to have violated the law could face fines and possible jail time.

California's foie gras ban, along with the California and Massachusetts egg and livestock laws—and the resulting litigation that pits multiple states against California and Massachusetts, respectively—raise serious questions about the future of animal

agriculture in America. If states continue to adopt laws such as those in California and Massachusetts, then these states will have made "a mockery" not just of the preemption provisions of the FMIA, PPIA, and other federal laws, but also of the very notion that the foods produced in this country under those laws will continue to be available in the very near future.

The challenges such laws pose are stark. If this Court allows states to prohibit interstate commerce in poultry products and other animal products that are inspected and deemed wholesome, unadulterated, and properly branded under federal law, then laws like these from California, Massachusetts, and other states could ultimately destroy our national market in food.

C. This case has significant implications for the future of U.S. meat production and consumption.

Poultry is one of the top three foods in the American diet. See U.S. Dept. of Agric. & U.S. Dept. of H. & Human Serv., *Dietary Guidelines for Americans, 2010* (Dec. 2010), *available at* https://www.cnpp.usda.gov/sites/default/files/dietary_guidelines_for_americans/PolicyDoc.pdf (listing "[c]hicken and chicken mixed dishes" as the third-greatest source of calories in the American diet).[7] Hence, the PPIA regulates one of the leading sources of calories in the American diet.

Today, a well-funded movement is underway that seeks to replace proteins in Americans' diets that are

[7] Poultry trails only grain-based desserts and yeast breads as a top source of calories in the American diet. *Id.*

derived from animals with some combination of plant-based and lab-grown "meat" ingredients.[8] The latter is derived from the cells of living animals but does not require the slaughter of those or other animals. Instead, cells are obtained from a living animal through a cheek swab or other means; grown and multiplied in a laboratory; and shaped and otherwise manipulated to resemble the traditional food product. *See id*. Proponents of both plant-based meat alternatives and lab-grown meats argue that these foods are superior to animal-based foods and benefit animals, humans, and the environment. *See* Opinion, Lisa Kramer, *'Clean Meat' Could be a Major Revolution for the Agriculture Sector*, GLOBE & MAIL, Nov. 30, 2017, https://www.theglobeandmail .com/report-on- business/rob-commentary/clean-meat-could-be-a-major-revolution-for-the-agriculture-sector /article37127259/. This movement seeks to introduce plant-based or lab-grown alternatives to many foods currently derived from living animals, including hamburgers, chicken breasts, and pork chops. While plant-based alternatives to meat products that mimic the look and taste of those meat products have existed for decades, lab-grown meat is also now at our doorstep. Predictions suggest the widespread debut of lab-grown meat may take place in the near future. *See, e.g*., Lucy Pasha-Robinson, *Lab- Grown 'Clean' Meat Could be on Sale by End of 2018, Says Producer,* INDEPENDENT, Mar. 2, 2018,

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[8] *See, e.g*., Rick Morgan, *Bill Gates & Richard Branson are Betting Lab-Grown Meat Might be the Food of the Future*, CNBC.com, Mar. 23, 2018, https://www.cnbc.com/2018/03/23/bill-gates-and-richard-branson-bet-on-lab-grown-meat-startup.html.

https://www.independent.co.uk/news/science/clean-meat-lab-grown-available-restaurants-2018-global-warming-greenhouse-emissions-a8236676.html. A market exists for such products. One national survey found that one in five Americans would eat lab-grown meat. *See* Pew Research Center, *U.S. Views of Technology and the Future*, Apr. 2014, *available at* http://www.pewinternet.org/2014/04/17/us-views-of-technology-and-the-future/.

But the entrepreneurs behind meat alternatives are thinking in grander terms. Recent research has predicted that "a meatless food industry featuring lab-grown meat, seafood substitutes, and insect protein [may] be the future of food[.]" *See* CBInsights, *Our Meatless Future: How the $90B Global Meat Market Gets Disrupted*, Nov. 9, 2017, https://www.cbinsights.com/research/future-of- meat-industrial-farming/. That future may well include lab-grown "foie gras." Indeed, one of the ingredients a California-based startup is seeking to recreate in a lab is foie gras. *See* Morgan, *Bill Gates & Richard Branson are Betting Lab-Grown Meat Might be the Food of the Future* (noting JUST, a vegan-foods company, is "experimenting with foie gras").

Even as some businesses seek to use technological advances to replace foods made from live animals with plant-based and lab-grown alternatives, some animal-rights groups are intent on using law and policy to prohibit the slaughter and sale of all animal-based foods altogether. For example, PETA, a powerful animal-rights group that supports California's § 25982, has called for a federal foie gras ban. *See* Alisa Mullins, *Top 5 Reasons to Ban Foie Gras*

Nationwide, PETA, July 1, 2012, https://www.peta.org/blog/top-5-reasons-ban-foie-gras-nationwide/. But the group has also declared that "[a]nimals are not ours to eat," regardless of the species in question. *See* Ingrid Newkirk, *Is There Such a Thing as 'Humane' Meat?*, PETA, Sept. 28, 2012, https://www.peta.org/blog/peta-s-position-sustainable-meat/.

California has already contemplated a future in which the state prohibits the sale of meat entirely. Despite this Court's ruling in *National Meat Ass'n*, in which a unanimous Court held that states are *not* free to decide which animals may or may not be turned into meat[9], the Ninth Circuit in the instant case ducked any inclination to reject California's mounting frolic with Prohibition by affirming its holding in *Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017), that "even if section 25982 results in the total ban of foie gras regardless of its production method," it would still be a constitutionally valid state law. 870 F. 3d 1140, 1150.

By failing to reject California's argument, the Ninth Circuit has pointed the way for a future in which only plant-based and lab-grown meat alternatives will be available for sale in California and other states. Under the Ninth Circuit's ruling, a state could reasonably conclude the PPIA (and FMIA and other constitutional provisions) does not prohibit a state from banning all sales of meat derived from living animals. A state such as California would seemingly then be free to ban the sale within its

[9] *See* Section I.C, *supra*.

borders of any and all meat products derived from living animals. Such a ban could include everything from foie gras to ground beef and pork chops.

Little imagination is required to envision how such a ban might be enacted. Using the Ninth Circuit's apparent embrace of California's seemingly limitless powers to ban foods, a state could argue that such a ban is necessary because the state has determined that animal slaughter, which necessarily involves the death of an animal, is cruel and inhumane. *Cf.* 870 F.3d 1140 at 1142 ("California determined that the force-feeding process . . . is cruel and inhumane.").

A resulting law might declare simply as follows: "A product may not be sold in this state if it is the result of animal slaughter." A state governor signing such a law might declare, analogous to the Orwellian language then-California Gov. Arnold Schwarzenegger used upon signing § 25982 into law, that the law's "intent is to ban the current production practice of slaughtering animals for their meat. It does not ban the food product, meat."[10] Just as California did with foie gras ingredients, a state adopting such a ban might delay implementation of the law for several years, ostensibly providing meat producers time to create animal products that are not the product of animals.

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[10] *Cf.* Signing Message of Governor Arnold Schwarzenegger, Sen. Bill 1520, 2003–2004 Reg. Sess. (Sept. 29, 2004) ("This bill's intent is to ban the current foie gras production practice of forcing a tube down a bird's throat to greatly increase the consumption of grain by the bird. It does not ban the food product, foie gras.").

Such a law would—just like § 25982—come at the expense of the farmers, chefs, and others who wish to sell animal products, and the consumers who wish to buy animal products obtained from living animals slaughtered under the PPIA, FMIA, and other relevant laws. Under this scenario, America's livestock farmers and consumers in all fifty states would be the obvious losers. Indeed, such a ruling could very well serve as the death knell for American livestock farmers, "the largest segment of U.S. agriculture" and the engine responsible for contributing a minimum of hundreds of billions of dollars annually to the U.S. economy. *See* North American Meat Inst., *The United States Meat Industry at a Glance,* https://www.meatinstitute.org/index.php?ht=d/sp/i/47465/pid/47465 (last visited Dec. 15, 2022).

To be clear, companies that produce meat-alternatives, along with advocacy groups such as PETA, are free—and must remain free—both to advocate in favor of, and to practice, their preferred diets. But it is equally true that those who choose to eat foie gras, hamburgers, pork chops, and other products that contain ingredients derived from living animals, must also remain free to do so.

Finally, *amici* have no opinion whatsoever about whether or not the future of food in America should involve—or will involve—the killing of animals for food. But *amici* would oppose in the most profound terms a future of food in America which involves the killing of no animals *because states have banned animal slaughter*. Such a future would trample an

essential liberty interest of all Americans, namely the freedom to make one's own food choices.

IV. This Court Should Protect the Rights of Food Producers and Consumers Against Unwarranted State Intrusions

Throughout the years, several Justices of this Court have discussed the importance of protecting an individual's right to make his or her own food choices. Justice Scalia, in dicta, indicated that this Court need not recognize a right to starve oneself in order to protect a "right to eat." *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883, 980 at n.1 (1992) (Scalia, J., dissenting) ("It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death."). Earlier, Justice William O. Douglas declared that "one's taste for food . . . is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the backs of people." *See Olff v. E. Side Union High Sch. Dist.*, *cert. denied*, 404 U.S. 1042, 1044 (1972) (Douglas, J., dissenting).

In an 1888 case heard by this Court that concerned a fatty and then-controversial food of French origin, oleomargarine, Justice Stephen Field wrote that the freedom to produce and obtain food is among the integral rights of all Americans. *See Powell v. Pennsylvania*, 127 U.S. 678, 690 (1888) (Field, J., dissenting) ("[T]he gift of life was accompanied by the right to seek and produce food [and] is an element of that freedom which every American citizen claims as his birthright."). Justice Field called these rights essential elements of liberty. *See id.* at 692 ("The right

to procure healthy and nutritious food . . . [is] among those inalienable rights, which, in my judgment, no state can give, and no state can take away, except in punishment for a crime."). Notably, in series of cases brought a decade later, in 1898, this Court embraced Justice Field's reasoning and denied states the power to ban oleomargarine. *See Schollenberger v. Pennsylvania*, 171 U.S. 1, 14 (1898) (rejecting a state's claim it may "absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated, and which in its pure state is healthful"). *Schollenberger* and its companion cases remain good law.

These views of individual rights pertaining to food and of government's lack of authority to ban a food product are bolstered by the words of Founding Fathers Thomas Jefferson and James Madison. Their own respective writings (and writings from one to another) provide additional reasons to be deeply skeptical of the legitimacy of bans such as that mandated under § 25982. Jefferson and Madison, respective authors of the Declaration of Independence and the Bill of Rights, abhorred any law which would ban a food. According to Jefferson:

> The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg . . . . Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. Thus in France the emetic was

> once forbidden as a medicine, and the potato as an article of food . . . .

Thomas Jefferson, *Notes on the State of Virginia*, *reprinted in* EARLY AMERICAN WRITING 437, 441 (Giles Gunn ed., 1994) (1785).

Madison, on the other hand, was outraged by an effort in his home state of Virginia to ban various foods. Madison, in a letter to Jefferson, criticized the Virginia legislature for introducing "a Resolution for *prohibiting* the importation of Rum, brandy, and other ardent spirits[.]" *See* James Madison, *Dec. 9, 1787 Letter to Thomas Jefferson*, *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON & MADISON 1776-1826 510 (James Morton Smith ed., 1995) (emphasis in original). Madison referred to the proposed ban as beyond the reach of any one state, beyond the power of any national government, and "little short of madness." *Id*. Madison wrote to Jefferson a second time about the resolution, this time calling the proposed ban one of "several mad freaks" the Virginia Assembly had embarked upon. *See* James Madison, *Dec. 20, 1787 Letter to Thomas Jefferson, in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON & MADISON 1776-1826 515 (James Morton Smith ed., 1995). He elaborated that the bill would ban "the importation of Rum, brandy, and all other spirits not distilled from some American production[,]" along with foreign beef, cheese, and other foods. *See id*. (emphasis in original). Madison called the bill a "despotic measure" that required "the most despotic means" of enforcement.

Taken together, Jefferson's denunciation of the "coercion" evident in France's potato ban and Madison's characterization of Virginia's proposed ban on various liquors and foods with words such as "lunacy," "madness," and "despoti[sm]" demonstrate that these leading Founding Fathers opposed laws that would serve to ban various foods.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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