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 REASON FOUNDATION AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS 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 Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences,

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[1] This brief was authored by counsel of record for *amici 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 *amici curiae*, their members, or their counsel made any such monetary contribution.

Counsel for *amici 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.

produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

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 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. 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 or different 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

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

provision that prohibits states from imposing any such "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.").

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

[3] The popularity of foie gras has only grown since that time. *See, e.g.*, THOMAS KELLER, THE FRENCH LAUNDRY COOKBOOK 104

popularity of foie gras in the United States 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 7.

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.* For example, the Book's directive for *lumpia*, a Filipino egg-roll dish, declares there to be "no special ingredient requirements" for the food. *See id.* Elsewhere, the Book discusses ingredient requirements for luncheon meat, noting such meat

(1999) (describing foie gras, which the renowned chef and author uses in many dishes, as "an expensive ingredient").

"cannot contain livers, kidneys, blood, detached skin, partially defatted pork or beef tissue, or stomachs."[4]

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* Petition at 8, *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, No. 17–1285 (9th Cir. Mar. 9, 2018) (citing 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*

[4] *Id.* Since foie gras is derived from "livers," it would not be an approved luncheon meat ingredient under the Book's stated ingredient requirements.

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 recent ruling in *National Meat Association v. Harris*, 565 U.S. 452 (2012), which centered on a federal law analogous to the PPIA—the Federal Meat Inspection Act ("FMIA")[5]—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.[6] 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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[5] 21 U.S.C. § 601 *et seq.*

[6] *See National Meat Ass'n v. Brown*, 599 F. 3d 1093, 1099 (9th Cir. 2010) ("Regulating what kinds of animals may be slaughtered calls for a host of practical, moral and public health judgments that . . . are the kinds of judgments reserved to the states, and nothing in the [Federal Meat Inspection Act] requires states to make them on a species-wide basis or not at all. Federal law regulates the meat inspection process; states are free to decide which animals may be turned into meat.").

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").

In the instant case, the Ninth Circuit determined that "[n]othing in the [PPIA] or its implementing regulations limits a state's ability to regulate the *types* of poultry that may be sold for human consumption." *See* 870 F.3d 1140, 1150 (emphasis in original). This reasoning, which the Ninth Circuit used to reverse the District Court—which had deferred to this Court's ruling in *National Meat Ass'n*—sounds suspiciously similar to the Ninth Circuit's flawed reasoning in *National Meat Ass'n* that nothing in the FMIA limits a state's ability "to decide which animals may be turned into meat." 599 F.3d 1093 at 1099. 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").

Separately, the Ninth Circuit, in the instant case, also ignored this Court's discussion in *National Meat Ass'n* of the sales ban that was at issue in that case. This Court held that such a sales ban "functions as a command" to slaughter facilities—such as those operated and overseen under the FMIA and PPIA—to slaughter one subset of animals but not another. *See* 565 U.S. 452 at 464. In effect, the California law at issue in *National Meat Ass'n* left it to the state to decide that Pig A may become an ingredient in pork chops, but Pig B may not. This Court ruled unanimously that the FMIA makes no such distinction, contains no such prohibition, and preempts a state law that does so. This Court also ruled in *National Meat Ass'n* that dressing up the regulation of slaughter facilities in the costume of a sales ban, as California has also done with § 25982 as concerns poultry processing facilties, is akin to putting lipstick on a pig and would "make a mockery" of the relevant preemption provision.[7]

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[7] *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

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 Ninth Circuit held that the word "ingredient" as used in the PPIA refers to "a physical component of a poultry product." 870 F.3d 1140 at 1147. The Ninth Circuit then concluded that requiring a "physical component" of a poultry product to have been produced in a particular way—or prohibiting it if it is produced in a particular way—somehow does not

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provision.").

impose a requirement on that physical component. One essential "physical component" of foie gras, for example, is that its sole or primary ingredient is the liver of duck or a goose. *See, e.g.*, Part I.B, *supra*. Another necessary "physical component" of foie gras is that the ingredient (fattened duck's or goose's liver) is, both at slaughter and sale, many times larger than its usual size thanks to the feeding process known as *gavage*. Even under the Ninth Circuit's preferred framework, then, § 25982 prohibits the sale in California of foie gras because it prohibits the sale of the "physical component of a poultry product," namely a duck liver fattened through the process of *gavage*.

As the District Court correctly ruled, § 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.

II. 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.[8]

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

[8] *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.

> 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 & 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 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 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) ("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.").

California's foie gras ban, along with the California and Massachusetts egg 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. 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).[9] 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 derived from animals with some combination of plant-

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

based and lab-grown "meat" ingredients.[10] 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

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[10] *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.

at our doorstep. Predictions suggest the widespread debut of lab-grown meat may take place before the end of this year. *See, e.g.*, Lucy Pasha-Robinson, *Lab-Grown 'Clean' Meat Could be on Sale by End of 2018, Says Producer*, INDEPENDENT, Mar. 2, 2018, 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 re-create 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/. On the same day the Ninth Circuit issued its ruling in the instant case, reports surfaced that a political party in Germany was seeking the wholesale "banning of the slaughter of animals" in that country. *See* Charlotte Meyer zu Natrup, *Meet the Political Party That Wants to Make Slaughtering Animals Illegal*, PLANT BASED NEWS, Sept. 15, 2017, https://www.plantbasednews.org/post/meet-the-german-political-party-that-wants-to-make-slaughtering-animals-illegal.

California has already contemplated a future in which the state prohibits the sale of meat entirely. The state argued before the Ninth Circuit in the instant case "that the PPIA does not prevent a state

from banning poultry products." 870 F.3d 1140 at 1146. Despite this Court's ruling in *National Meat Ass'n*, in which a unanimous Court held quite the opposite—that states are *not* free to decide which animals may or may not be turned into meat[11]—the Ninth Circuit's ruling ducked any inclination to reject California's mounting frolic with Prohibition.

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 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

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

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."[12] 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.

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

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[12] *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.").

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 Apr. 8, 2018).

On the other hand, the winners under this scenario would be the approximately two-percent of Americans who currently do not eat meat or meat products and the entrepreneurs who produce plant-based and lab-grown meat alternatives. *See* Kathryn Asher et al., *Study of Current and Former Vegetarians and Vegans*, FAUNALYTICS, Dec. 2014, https://faunalytics.org/wp-content/uploads/2015/06/Faunalytics_Current-Former-Vegetarians_Full-Report.pdf (finding that two-percent of Americans currently practice a vegan or vegetarian diet).

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.

III. 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, wrote 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 while the latter was stationed in Paris, 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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April 11, 2018