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 ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

ALF long has advocated for judicial adherence to this Court's federal preemption principles, especially in connection with federally regulated products. Although foie gras—the wholesome, federally defined, regulated, approved, and inspected poultry product at issue here—is a delicacy, this case presents federal preemption and dormant Commerce Clause questions that have far broader implications: Can a state or local government ban the sale of *any* federally regulated

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[1] All parties were provided timely notice and have consented to the filing of this brief. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

and approved agricultural food product or commodity merely because it does not like how, where, or by whom, it is produced or grown?

ALF's interest in this issue, and its potential devasting impact on nationally uniform federal regulation of poultry, meat, and other agricultural products, goes back at least to 2006. In ALF's capacity as a national public interest law firm, we represented the Illinois Restaurant Association in a challenge to a subsequently repealed Chicago ordinance that banned restaurants from serving foie gras on the debatable theory that force-feeding ducks and geese to fatten their livers is unethical. *See Ill. Rest. Ass'n v. City of Chicago*, 492 F. Supp. 2d 891 (N.D. Ill. 2007), *vacated as moot*, No. 07-2605 (7th Cir. July 10, 2008).

We are filing an amicus brief here to urge the Court to grant certiorari and invalidate California's statutory ban on sale of force-fed foie gras, Cal. Health & Safety Code § 25982. Although ALF agrees with Petitioners that this case raises important dormant Commerce Clause as well as federal preemption issues, our brief focuses on federal preemption, specifically, the dissenting opinion authored by Circuit Judge Lawrence VanDyke. *See* Pet. App. 29-47. His lucid and persuasive dissent is a compelling reason why this Court should grant review and adopt his analyses of both impossibility preemption and express preemption. Or at the least, as Petitioners suggest in the alternative, the Court should hold the petition pending the Court's forthcoming decision in *National Pork Producers Council v. Ross*, No. 21-468.

SUMMARY OF ARGUMENT

In most cases where, as here, a federal statute contains a preemption provision, express preemption analysis precedes consideration of conflict preemption principles. The district court, however, denied Petitioners' motion to add to their Complaint an express preemption claim based on new, unrebutted evidence that "foie gras cannot be produced by a method other than force-feeding." Pet. at 16. On appeal to the Ninth Circuit, the panel majority addressed Petitioners' impossibility preemption claim first. *See* Pet. App. 10-15. Then, based on the law of the case doctrine, the majority affirmed the district court's denial of leave to amend the Complaint, and declined to consider the merits of Petitioners' new express preemption arguments. *Id.* at 15-17, 40.[2]

The dissenting opinion tracks the majority opinion's structure. It discusses impossibility preemption first, *id.* at 31-39, and then express preemption, *id.* at 39-47. This amicus brief does the same.[3]

1. The doctrine of impossibility preemption applies where, as here, it is impossible to comply with both state and federal law. California Health & Safety

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[2] Citations to Pet. App. 1 through Pet. App. 29 are to the Ninth Circuit majority opinion; citations to Pet. App. 30 through 47 are to the dissent.

[3] Because Judge VanDyke's dissenting opinion concludes that the California statute is preempted, it does not address the dormant Commerce Clause. *See* Pet. App. 30 n.1.

Code § 25982 prohibits the sale of foie gras produced by the force-feeding of geese and ducks. United States Department of Agriculture (USDA) poultry product standards, however, require foie gras to be obtained exclusively by force-feeding. In other words, § 25982 expressly prohibits products made by the same foie gras production process that federal law requires. It is impossible, therefore, to comply with both state and federal law. In fact, the record now contains undisputed evidence that as a matter of animal husbandry and waterfowl biology, force-feeding is the *only* way that foie gras can be produced.

Contrary to the majority opinion, impossibility preemption applies even though § 25982 is in the form of a ban on sales. California's ban is both partial and process-based because it prohibits only the sale of foie gras that is produced from the force-feeding of geese and ducks. This is the same force-feeding process that federal law requires for the sale of foie gras. It is impossible to comply with both the state prohibition against sale of foie gras that is force-fed and the federal prohibition against sale of foie gras that is *not* force-fed. Voluntary or involuntary forbearance from selling force-fed foie gras in California does not avoid this direct conflict between state and federal law

2. The express preemption provision set forth in the Poultry Products Inspection Act (PPIA), 21 U.S.C. § 457e, which prohibits a State from imposing its own, additional or different ingredient requirements for poultry products, also renders the California statute devoid of force and effect. USDA's foie gras product ingredient standards, which govern the composition

and sale of various types of goose and duck foie gras products ranging from whole foie gras to foie gras puree, require that the foie gras ingredient in each such product be obtained exclusively from force-feeding. Section 25982, however, imposes a *different* ingredient requirement for the sale of foie gras products—the requirement that the foie gras in such products *not* be the result of force feeding. This is exactly the type of different, state-imposed ingredient requirement that the PPIA, in the interest of national uniformity, expressly preempts.

Even more fundamentally, § 25982 imposes, wherever foie gras is produced, the California legislature's ethical judgment about force-feeding geese and ducks. By so doing, the California statute usurps the sovereign prerogatives of other States, and thus violates interstate federalism, *i.e.*, the principle that the sovereignty of each State is co-equal with that of every other State. As a practical matter, because force-feeding is the only way to produce foie gras, California, the nation's most populous State, has denied its residents and visitors, for reasons wholly unrelated to food safety, the right to choose to consume a wholesome, federally approved agricultural food product. This is the beginning of an unconstitutional slippery slope that chills individual liberty as well as free enterprise.

ARGUMENT

A. The Court should grant review and adopt the dissenting opinion's preemption analysis

1. Impossibility preemption applies because the California statute prohibits poultry products that are produced by the same process that federal law requires

Judge VanDyke's impossibility preemption analysis focuses on USDA's longstanding, "inherently *process-based*" definition of foie gras: goose or duck liver "obtained *exclusively* from *specially fed and fattened* geese and ducks." Pet. App. 32 (quoting USDA Food Safety and Inspection Service (FSIS), *Food Standards and Labeling Policy Book* (rev. Aug. 2005) (emphasis added));[4] *see also* Pet. at 7-8 (discussing 21 U.S.C. § 457(b) ([D]efinitions and standards of identity or composition) and 9 C.F.R. § 381.155(a) (Authorization to establish specifications) under which the USDA foie gras definition and product ingredient standards set forth in the *Food Standards Book* have been adopted and are enforced). There is no dispute that "'specially fed and fattened' means force-fed." Pet. App. 32; *see also id.* at 11 (majority opinion) (acknowledging that the USDA *Food Standards Book* "and other USDA documents support the proposition that a 'specially fed and fattened' bird is one that has been force fed").

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[4] Available at https://tinyurl.com/4wfm7x3p

Indeed, producing foie gras "using the French practice of gavage, which involves feeding ducks or geese with the goal of fattening their livers . . . dates back to at least Roman times." *Ill. Rest. Ass'n*, 492 F. Supp. 2d at 892. Translated into English, French law defines foie gras as "the liver of a duck or a goose specially fattened by gavage." C. RURAL ET DE LA PÊCHE MARITIME art. L.654-27-1 (Fr.) (Jan. 5, 2006). The close similarity between the USDA and French definitions is not coincidental. A USDA policy memorandum, referenced in the Foie Gras section of the *Food Standards Book*, explains that "[i]n 1975, representatives of the French government petitioned the USDA to adopt the French standards for foie gras products." USDA Stds. and Labeling Div., Meat and Poultry Inspection Tech. Servs., Policy Memo 076 (Sept. 21, 1984).[5] USDA agreed to do so, and continues to adhere to the French, process-based definition of foie gras.

In the Ninth Circuit's most recent previous opinion in this litigation, *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra* ("*Canards II*"), 870 F.3d 1140 (9th Cir. 2017), the court's "conclusions appear to have been inextricably tied to its now-inapt factual understanding that foie gras could be produced without force-feeding." Pet. App. 41 n.4. The Petitioners "now have demonstrated that force-feeding *is* required to produce foie gras." *Id.* at 40; *see also id.* at 45-46 ("force-feeding is the only method of production"); *id.* at 16 (majority opinion)

[5] Available at https://tinyurl.com/vnrv3bpc

(acknowledging that Petitioners "have now established the *impossibility* of non-force-fed foie gras") (emphasis added); Pet. at 12, 16-17 (discussing undisputed evidence in the record that foie gras can be produced only by force-feeding).

The *process-based* nature of USDA's definition of foie gras, *i.e.*, goose or duck liver that is specially fattened by force-feeding, is the inescapable reason why § 25982 makes it impossible to comply with both state and federal law. As the dissenting opinion emphasizes, "[o]nce foie gras' federal definition is properly understood, the tension with California's § 25982 becomes clear." Pet. App. 33. Section 25982 states that "[a] product may not be sold in California if it is the *result of force feeding* a bird for the purpose of enlarging the bird's liver beyond normal size" (emphasis added). In other words, § 25982, like the USDA definition of foie gras, "regulates process." *Id.* (citing *Canards II*, 870 F.3d at 1144 ("California's legislature intended to ban not foie gras itself, but rather the practice of *producing foie gras by force-feeding*.") (emphasis added in dissenting opinion)).

Compliance with both state and federal law is impossible because the force-feeding that § 25982 *prohibits* if a product is to be sold in California as foie gras is the very same force-feeding that federal law *requires* if a product is to be sold in California as foie gras. As the dissenting opinion explains—

> In short, the federal government has defined foie gras to mean specially fed and

> fattened (i.e., force-fed) goose and duck liver, while California has banned the sale of any foie gras produced by force-feeding the bird. This means *there is no universe in which Plaintiffs can comply with both the PPIA and § 25982*, because there is no universe in which Plaintiffs could follow California's requirement for acceptable foie gras while also meeting the federal definition of what foie gras is.

Pet. App. 33-34 (emphasis added). "Ultimately, the PPIA and § 25982 require foie gras to be produced through mutually exclusive and irreconcilable methods." *Id.* at 39. This unavoidable clash between state and federal law is the reason why it is impossible to comply with both.

The majority opinion appears to concede this crucial point: "If, for example, federal law required foie gras to be from force-fed birds but California law required foie gras *not* to be from force-fed birds, producers could not comply with both state and federal law." *Id.* at 14. In reality, this "hypothetical" is precisely the case here and compels the conclusion that the doctrine of impossibility preemption renders § 25982 invalid. *See generally Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013) ("[T]he Court has found state law to be impliedly pre-empted where it is 'impossible for a private party to comply with both state and federal requirements'" (quoting *English v. Gen. Elec. Co.*, 496 U.S. at 79)); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011) ("[S]tate and

federal law conflict where it is impossible for a private party to comply with both state and federal requirements" (internal quotation marks omitted).).

Acknowledging "that states cannot enact preempted regulations under the guise of a sales ban," the majority opinion nonetheless asserts that "[e]ven if federal law requires foie gras to be the liver of force-fed birds, California says only that it cannot be sold in the State." Pet. App. 12, 14. To the contrary, the impossibility of complying with both state and federal law cannot be avoided merely by drawing an illusory distinction between the expressly process-based federal definition of foie gras and the expressly process-based California statute merely because the latter is in the form of a ban on sale of force-fed foie gras.

In reality, the PPIA effects its own ban on sales. This is because a poultry product purporting to be foie gras but not produced in compliance with the federal definition (i.e., not produced by force-feeding) would be misbranded under the PPIA. *See* 21 U.S.C. § 453(h) (definition of misbranded poultry products). More specifically, a non-force-fed product labeled as "foie gras" would be misbranded because its labeling would be "false and misleading," *id.* § 453(h)(1); it would be "offered for sale under the name of another food," *id.* § 453(h)(2); and it would not be labeled as an "imitation," § 453(h)(3). The PPIA makes it unlawful to sell or transport in interstate commerce a poultry product that is misbranded. *See id.* § 458(a)(2) & (3). Therefore, even the majority's substantively hollow distinction between state and federal law fails to avoid

impossibility preemption: Petitioners cannot comply with both California's prohibition against sale of foie gras that is force-fed and federal law's prohibition against sale of "foie gras" that is *not* force-fed.

Furthermore, as the dissenting opinion discusses at length, the Supreme Court in *National Meat Association v. Harris*, 565 U.S. 452 (2012), rejected the same reasoning that the majority opinion relies upon here. "*National Meat* makes clear that a state cannot sidestep a preemption issue simply by banning the sale of a certain good produced a certain way instead of directly banning the process itself." Pet. App. 37.

The Court held in *National Meat* that the express preemption provision in the Federal Meat Inspection Act (FMIA), 21 U.S.C. § 678, barred a California statute that "[i]n essence . . . substitute[d] a new regulatory scheme for the one that the FSIS uses" in connection with the handling of nonambulatory pigs at swine slaughterhouses. 565 U.S. at 460. The unanimous Court explained that "[w]here under federal law a slaughterhouse may take one course of action in handling a nonambulatory pig, under state law the slaughterhouse must take another." *Id.* This conflict ran headlong into the FMIA preemption provision's prohibition against imposition of additional or different state requirements since "[a]t every turn" the California statute "impose[d] additional or different requirements on swine slaughterhouses." *Id.*

The Court squarely rejected the argument that the California statute's "ban on sales [of nonambulatory animals] does not regulate a slaughterhouse's 'operations' because it kicks in only after they have ended." *Id.* at 463. "[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." *Id.* at 464.

In other words, "[t]he Supreme Court invalidated California's statute because the 'sales ban' actually functioned 'as a command to slaughterhouses to structure their operations in the exact way the [statute] mandates.'" Pet. App. 35-36 (quoting *National Meat*, 565 U.S. at 464). The same is true here. California's ban on sale of force-fed foie gras is essentially a command to foie gras producers to structure their operations in a way that does not involve force-feeding. But complying with that state-law command without violating federal law is impossible: Even if (contrary to the undisputed evidence now in the record) foie gras could be produced by some other method, USDA's foie gras definition *requires* foie gras to be produced by force-feeding. As in *National Meat*, California's statute "endeavors to regulate the same thing, at the same

time, in the same place—except by imposing different requirements." 565 U.S. at 468.[6]

The majority opinion fares no better by attempting to circumvent preemption on the theory that Petitioners "can still force feed birds to make their products . . . They just cannot sell those products in California." Pet. App. 11. As the dissent explains, "[t]he problem with this supposed solution is that it too already has been flatly rejected by the Supreme Court." *Id.* at 37 (citing *Mutual Pharm. Co. v. Bartlett*, *supra*). Holding that the Food, Drug, and Cosmetic Act impliedly preempted a state-law design-defect claim that a drug's federally regulated labeling should have provided stronger warnings, the Court held in *Mutual Pharmaceutical* that "adopting the Court of Appeals' rationale would render impossibility pre-emption a dead letter and work a revolution in this Court pre-emption case law." 570 U.S. at 475. "Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether . . . ." *Id.* at 488.

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[6] The majority opinion's point that *National Meat* involved an express preemption provision, *see* Pet. App. 12, is a distinction without a difference. Express and implied preemption are not "rigidly distinct" categories. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990). As is the case here, a state statute can be impliedly as well as expressly preempted. *See generally Arizona v. United States*, 567 U.S. 387, 406 (2012) ("[T]he existence of an express preemption provisio[n] does *not* bar the ordinary working of conflict preemption principles.") (internal quotation marks omitted).

The majority opinion acknowledges "*Bartlett* says that, when faced with conflicting state tort law and federal law, the courts cannot simply tell manufacturers to withdraw from the market." Pet. App. 15. According to the majority, "[t]hat proposition does not erase states' authority to prohibit the sale of certain products within their borders." *Id.* This general contention about state authority, however, does not address the question presented here—"whether California can attempt to ban *some* foie gras in a way that directly conflicts with the federal definition of what foie gras is, particularly when that is also the only way to make foie gras." *Id.* at 43.

"The record in [this] case is unambiguous: California purports to ban only *some* foie gras, and that ban is entirely tied to the production method for that foie gras." *Id.* at 42. "[T]he fact that California might be able to ban foie gras altogether does not control whether it can enact an attempted partial ban that runs headlong into the federal definition . . . ." *Id.* at 44. Because the state statute prohibits sale of foie gras in California produced by the same force-feeding process that federal law requires for sale of foie gras in California, the doctrine of impossibility preemption renders § 25982 invalid.

2. Express preemption applies because the California statute imposes an ingredient requirement for a group of poultry products that is different than the federal ingredient requirement for the same group of poultry products

The PPIA's express preemption provision states in pertinent part that "ingredient requirements . . . in addition to, or different than, those made under this chapter may not be imposed by any State." 21 U.S.C. § 467e. Congress added § 467e to the PPIA in 1968, primarily to "maintain[] uniformity regarding the *inter* state sale of domestic poultry products . . . according to [the] uniform federal standards." *Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 296 (5th Cir. 1994).

As Judge VanDyke's dissenting opinion demonstrates, there is a strong argument that § 467e expressly preempts California's ban on sale of force-fed foie gras. *See* Pet. App. 45-47. By banning the sale of foie gras that "is the result of force feeding," Cal. Heath & Safety Code § 25982, California is imposing an ingredient requirement for foie gras products—a requirement that foie gras products *not* contain force-fed goose or duck liver—that is indisputably *different than* USDA's requirement that foie gras products contain specially fattened goose and/or duck liver produced exclusively by force-feeding.

Rather than squarely addressing the merits of this express preemption argument, the majority opinion,

Pet. App. 15, affirms the district court's denial of Petitioners' motion to amend their Complaint to include an express preemption claim based on unrebutted evidence—added to the record after the Ninth Circuit's decision in *Canards II*—that "[f]orce-feeding is *necessary* to produce the size and fat content that makes a liver 'foie gras.'" Pet. at 12 (quoting Am. Veterinary Med. Ass'n) (emphasis added in Petition); *see also id.* (summarizing expert evidence that "[a]s a matter of basic waterfowl biology, it is impossible to obtain a fattened liver from a goose or duck without causing the bird to consume more food than it (or a typical duck like it, raised under the same conditions and provided the same diet) would consume voluntarily"); *see also* Pet. App. 16 (majority opinion) ("[T]he record now includes evidence to that effect."); *id.* at 40 ("[T]he record before us now . . . demonstrate[s] that force-feeding *is* required to produce foie gras.").

The dissenting opinion discusses why the law of the case doctrine does not bind the Petitioners to the holding in *Canards II*, 870 F.3d at 1148, that express preemption is inapplicable. Pet. App. 40-46. As the dissent observes, the express preemption holding in *Canards II* appears to have been "inextricably tied" to the panel's erroneous understanding that foie gras can be produced without force-feeding. *Id.* 41 n.4. This case now "presents a fact-pattern that the *Canards II* panel clearly *did not* consider—where force-feeding is the only method of production *and* § 25982 is not a complete ban on foie gras." *Id.* at 45-46.

The likelihood that § 25982, based on the expanded factual record, is expressly as well as impliedly preempted, is an additional reason why this Court should grant certiorari. *See* Br. for the United States as Amicus Curiae at 15, *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra* (No. 17-1285) (discussing "the difficult question whether a statute like Section 25982 would be preempted if, as applied, it operated to ban a particular substance in a poultry product"). Because the record now establishes that California statute imposes an "ingredient requirement[]" for foie gras poultry products that *is* "different than" the federal ingredient requirement for the same products, it is expressly preempted by 21 U.S.C. § 467e.

The *Canards II* panel indicated "Congress made clear that the PPIA's 'ingredient requirements' address the physical components of poultry products." 870 F.3d at 1148. Section 25982 does exactly that: It requires that foie gras poultry products sold in California contain goose or duck liver that is *not* from force-fed geese or ducks. This state-law ingredient requirement is indisputably different than, and indeed precisely the opposite of, the corresponding USDA ingredient requirement for foie gras products.

More specifically, the USDA *Food Standards Book*, *supra*, prescribes physical ingredient requirements for at least 14 types of poultry products that in whole or part contain goose liver and/or duck liver foie gras (e.g., "whole" foie gras; foie gras "blocks," "parfaits," "pates," and "purees"). *See* Pet. at 9. These USDA

ingredient requirements not only specify the "minimum duck liver or goose liver foie gras content" of each type of product (e.g., a "Parfait of Duck Foie Gras" must be "composed of a minimum 85 percent . . . duck liver foie gras"), but also mandate that all foie gras be "obtained exclusively from specially fed and fattened geese and ducks," *id.*, which as discussed above, means by force-feeding.

By prohibiting *only* the sale of force-fed foie gras products, § 25982 inexorably imposes an ingredient requirement that is different than the federal requirement. As the dissenting opinion explains, "[t]he problem is that California has attempted to ban only one particular production method for foie gras (force-feeding), but that one production method is also precisely how federal law defines the ingredient foie gras, and there is no other way to make foie gras." Pet. App. 42. Further, contrary to the suggestion in *Canards II* that ingredient requirements are unrelated to feeding practices, *see* 870 F.3d at 1148, the Petitioners "have now established [that] feeding practices *do in fact* affect the physical components of foie gras. The liver of a force-fed duck will be up to ten times larger, lighter in color, have a higher ratio of saturated fatty acids, as well as have a different texture, taste, and smell than the liver of a non-force-fed duck." Pet. App. 46; *see also id.* at 47 (photos comparing force-fed and non-force-fed poultry livers).

B. California's ongoing efforts to restrict which wholesome, federally approved and inspected agricultural food products its residents and visitors can eat warrant this Court's attention

The fact that this case involves a gourmet food does not diminish the importance of the federal preemption and dormant Commerce Clause questions presented by the petition. California's highly contentious rationale for banning the sale of force-fed foie gras—its disapproval of the process by which foie gras, as a matter of both federal law and biological fact must be, and is, produced—underscores the significance of the issues in this case. *See* Pet. App. 28, 33 (discussing legislative intent underlying § 25982).

The Court need look no further than Docket No. 21-468, *National Pork Producers Council v. Ross,* in which certiorari already has been granted, to see the top of the slippery slope on which the California statutes in both of these cases precariously rest. *National Pork Council* concerns California Proposition 12 (the "Farm Animal Confinement Initiative"), Cal. Health & Safety Code § 25990 *et seq.* This statute bans the sale of pork, veal, and eggs derived from sows, calves, and hens that anywhere are confined "in a cruel manner," *i.e.*, confined in less than the specific minimum floorspace (in square footage) that California determines is adequate. Like California's ban on sale of force-fed foie gras, the farm animal confinement statute imposes requirements on the *process* by which federally regulated and inspected

agricultural food products must be produced *in other States* in order to be lawfully sold in California.

It is not difficult to imagine where this type of state "animal ethics" legislation can lead unless invalidated by this Court. Animal rights, environmental, farm labor, and other types of activists will be able to lobby state legislatures to enact legislation, like § 25982, that deprives a State's residents and visitors of the right to decide for themselves what wholesome, federally compliant foods to eat. Instead, a State, at the behest of idealogues and zealots, will be able to ban the sale of any federally regulated agricultural or other food product that is produced in whatever manner virtue-signaling politicians claim is morally, environmentally, or even psychologically or emotionally objectionable.

Consider, for example, agricultural produce grown outside of California with the aid of diesel fuel-powered farm equipment. A statute like the one at issue here would enable California to engage in extraterritorial regulation of agricultural production processes by banning the sale of any produce from farms that do not use electric-powered equipment. Confronted with such a statute, out-of-state growers either would have to abandon (at enormous expense) their diesel fuel-powered equipment or forgo the lucrative California market. Either way, by dictating a critical part of the agricultural production process to growers in other States, California would be regulating what out-of-state produce should be

available to its residents and visitors, and as a practical matter, to the entire nation.

In addition to raising significant federal preemption and dormant Commerce Clause concerns, this type of state statute "imperils the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). Under the federal system, the 50 States are "coequal sovereigns," and "[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in the original scheme of the Constitution and the Fourteenth Amendment." *Id.* at 292, 293. By imposing, in the form of a process-based sales ban, its own nationwide requirement for how foie gras should *not* be produced, California is offending interstate federalism. The State is anointing itself "more equal" than the other States. This Court should not allow California to usurp or denigrate the sovereignty of the other States by enacting such laws.

CONCLUSION

The Court should grant the Petition For a Writ of Certiorari.

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