No. 15-471

IN THE
Supreme Court of the United States

ENERGY & ENVIRONMENT LEGAL INSTITUTE, *et al.*,
Petitioners,
v.
JOSHUA EPEL, IN HIS CAPACITY AS COMMISSIONER OF THE COLORADO PUBLIC UTILITIES COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b), Association des Éleveurs de Canards et d'Oies du Québec, HVFG LLC, and Hot's Restaurant Group, Inc., respectfully move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel of record for all parties were timely notified of the intent of these amici to file the attached brief, as required by Rule 37.2(a). Petitioners have consented to the filing of this brief, and the State of Colorado Respondents have no objection to the filing of this brief.[1] This motion is necessary, however, because the Intervenor Respondents (Sierra Club, The Wilderness Society, Environment Colorado, Conservation Colorado Education Fund, Solar Energy Industries Association, and Interwest Energy Alliance) have refused consent.

Amici have a critical interest in this case because they are the plaintiffs and appellees in a case in the Ninth Circuit against the California Attorney General that raised the same foundational issue of whether one State may restrain commerce in wholesome commodities from other States and countries based solely on its disfavor of the production methods used by producers in those other States and countries. *See Ass'n des Éleveurs de*

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[1] Correspondence confirming that Petitioners have consented and that the State of Colorado Respondents have no objection is being concurrently filed with the Clerk of the Court.

Canards et d'Oies du Québec v. Harris, 729 F.3d 397 (9th Cir. 2013) ("*Ass'n des Éleveurs*"). Here, not only does the Tenth Circuit's opinion further deepen the conflict created by the Ninth Circuit's opinion in *Ass'n des Éleveurs*, but the outcome of this petition, if granted, will have a direct impact on the dormant Commerce Clause claims *amici* have asserted.[2]

Indeed, as discussed below, when the Ninth Circuit recently issued an order asking the parties in another pending dormant Commerce Clause case whether the same issue that is at the heart of this case should be decided *en banc*, the panel specifically cited the published opinion in *amici*'s case as conflicting with an earlier recent decision on this issue. *See* Order filed Aug. 29, 2014, in *Sam Francis Foundation v. Christies, Inc.*, Ninth Circuit Case No. 12-56067, ECF Dkt. No. 85. (*Amici* filed an amicus brief in support of *en banc* review in that case, and the Ninth Circuit took the case *en banc*.) *Amici* has first-hand experience with the confusion among the lower federal courts.

Amici therefore respectfully request that they be granted leave to file the accompanying brief as *amici curiae* in support of Petitioners.

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[2] *Amici* ultimately prevailed in establishing that California's attempt to ban the sale of wholesome, USDA-approved poultry products containing foie gras is unconstitutional under the Supremacy Clause (as preempted by the federal Poultry Products Inspection Act, which expressly preempts additional or different ingredient requirements imposed by any State), but the California Attorney General has appealed the judgment of the district court, which did not ultimately rule on *amici*'s claims under the dormant Commerce Clause.

Respectfully submitted,

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November 13, 2015

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INTEREST OF *AMICI CURIAE*[3]

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

Amici have a critical interest in this case because they are the plaintiffs and appellees in a case in the Ninth Circuit against the California Attorney General that raised the same foundational issue of whether one State may restrain commerce in wholesome commodities from other States and countries based solely on its disfavor of the production methods used by producers in those other States and countries. *See Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 397 (9th Cir. 2013) ("*Ass'n des Éleveurs*"). Here, not only does the Tenth Circuit's opinion further deepen the conflict created by the Ninth Circuit's opinion in *Ass'n des Éleveurs*, but the outcome of this petition, if

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[3] This brief was authored by *amici* and their counsel listed on the front cover, and was not authored in whole or in part by counsel for any party. No one other than *amici* or their counsel has made any monetary contribution to the preparation or submission of this brief. Counsel of record for all parties were timely notified of the intent of these amici to file the attached brief.

granted, will have a direct impact on the dormant Commerce Clause claims *amici* have asserted.[4]

Indeed, as discussed below, when the Ninth Circuit recently issued an order asking the parties in another pending dormant Commerce Clause case whether the same issue that is at the heart of this case should be decided *en banc*, the panel specifically cited the published opinion in *amici*'s case as conflicting with an earlier recent decision on this issue. *See* Order filed Aug. 29, 2014, in *Sam Francis Foundation v. Christies, Inc.*, Ninth Circuit Case No. 12-56067, ECF Dkt. No. 85. (*Amici* filed an amicus brief in support of *en banc* review in that case, and the Ninth Circuit took the case *en banc*.)

SUMMARY OF THE ARGUMENT

A simple riddle illustrates why the Court should grant the petition in this case on the issue of extraterritorial regulation:

> What do electrons added to the nation's electricity grid from generators outside Colorado have in common with wholesome foie

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[4] *Amici* ultimately prevailed in establishing that California's attempt to ban the sale of wholesome, USDA-approved poultry products containing foie gras is unconstitutional under the Supremacy Clause (as preempted by the federal Poultry Products Inspection Act, which expressly preempts additional or different ingredient requirements imposed by any State), but the California Attorney General has appealed the judgment of the district court, which did not ultimately rule on *amici*'s claims under the dormant Commerce Clause.

gras added to the nation's food supply from ducks fed by farmers outside California?

The answer is that, unless this Court grants certiorari and reverses, the Tenth Circuit and (depending on the day) the Ninth Circuit will continue to allow Colorado and California to restrain interstate and foreign commerce in the markets for both of these unadulterated products merely because those States' legislatures disfavor the production methods that — far beyond their borders — the out-of-state power plants and farmers use to produce them.

ARGUMENT

I. The Court Should Grant Certiorari to Resolve the Split Among the Circuits Over the Application of This Court's Leading Precedents on Whether an Extraterritorial Regulation Is Unconstitutional When It Blocks Interstate Commerce Based on Out-of-State Conduct *Other* Than Pricing.

When one State tries to legislate the production methods to be used by producers in other States as a condition to the sale of their commodity products, the constitutionality of that law should not vary by federal circuit. This Court has made unmistakably clear that "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994);

U.S. Const. art. I, sec. 8, cl. 3 (conferring on Congress the power to "regulate commerce . . . among the several states"). Yet, while most courts recognize this fundamental principle from the Court's dormant Commerce Clause jurisprudence, the Tenth Circuit's opinion in this case represents a growing but dangerous split among the circuits. This Court should resolve that divide and reinforce the basic American notion that one State "may not insist that producers in other States surrender whatever competitive advantages they may possess." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 580 (1986).

In the case of the power plants whose electricity is the target of the regulations at issue here, Colorado restrains commerce by limiting the supply from producers who generate energy outside the State and upload that electricity to an interstate grid. Colorado's putative interest is in requiring production from renewable sources of energy "regardless of where it occurs and irrespective of where the electricity is used." Pet. at 8. And the Tenth Circuit condoned this even if the "physical electricity generated by the renewable sources and supplied to the grid is indistinguishable from the physical electricity generated by nonrenewable sources and supplied to the grid." *Id.* at 9-10.

In the case of the *amici* poultry farmers — whose foie gras products were the target of a California statute regulating the feeding of ducks and geese — California restrained commerce by outright banning the sale of wholesome, unadulterated poultry

products in California based *solely* on whether the farmers in New York and Canada used an agricultural method that California handicaps its own farmers from using to feed their own ducks. *See* Cal. Health & Safety Code §§ 25981, 25982. California's purported interest was in preventing the ducks from undergoing what it perceived to be animal cruelty — even though *amici*'s ducks are raised and turned into USDA-certified poultry products *entirely* outside California. (Just as other States may have differing definitions of "renewable" energy, New York and Canada have their own strict laws against animal cruelty, with which the *amici* farmers fully comply.)

At issue in this case, therefore, is whether these kinds of production method-based restraints on interstate commerce violate the principles in this Court's dormant Commerce Clause jurisprudence or whether — contrary to anything the Court has ever said — the extraterritoriality doctrine is limited to statutes and regulations related to pricing. Petitioner has set forth the basic split among the circuits on this issue, and *amici* will not repeat that discussion here. Pet. at 37-42. Suffice it to say that some circuits recognize the extraterritoriality principle as applying to regulations that have the practical effect of controlling out-of-state conduct, while the Ninth Circuit and now the Tenth have limited this Court's holdings to the context of prices.

Perhaps nowhere is this rift more pronounced than within the Ninth Circuit itself. Indeed, the confusion among the lower courts is so manifest that

the Ninth Circuit has recently expressly recognized its own inconsistent opinions. On the way to an en banc call in *Sam Francis Foundation v. Christies, Inc.*, the Ninth Circuit asked the parties in that case to specifically brief the issue of "whether there is a conflict in our case law regarding the applicability of *Healy v. Beer Inst.*, 491 U.S. 324 (1989)." *See* Order filed Aug. 29, 2014, in *Sam Francis Foundation v. Christies, Inc.*, Ninth Circuit Case No. 12-56067, ECF Dkt. No. 85. The two opinions cited by the Ninth Circuit are *Ass'n des Éleveurs* — i.e., *amici's* case — and *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

In *Rocky Mountain*, at issue was California's promulgation of a Low Carbon Fuel Standard that limited the sale of ethanol within California based on the carbon-producing impact of its production in other States and countries. In analyzing whether the statute constituted an impermissible extraterritorial regulation, the Ninth Circuit recognized that, "Under *Healy*, the 'critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundary of the state.'" *Rocky Mountain*, 730- F.3d at 1101 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)). The Ninth Circuit went on to analyze whether the legislation had the "practical effect" of regulating extraterritorially, but ultimately concluded that it did not. *Id.*

The Ninth Circuit's opinion in *amici's* case, on the other hand, entirely bypassed *Healy's* "critical

inquiry" into whether the practical effect of the California ban on foie gras was to dictate a producer's conduct beyond its borders. Rather, the Ninth Circuit in *Ass'n des Éleveurs* summarily concluded that "*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 't[ie] the price of its in-state products to out-of-state prices.'" *Ass'n des Éleveurs*, 729 F.3d at 951.[5] The Ninth Circuit reaffirmed this view just months ago. *See Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015) (distinguishing *Healy*, *Brown-Forman*, and *Baldwin* as involving "price-control or price-affirmation statutes").

Now the Tenth Circuit has waded into the quagmire by directly siding with the Ninth Circuit's flawed opinion in *amici's* case. Indeed, the Tenth Circuit's opinion expressly adopted the Ninth Circuit's view in *Ass'n des Éleveurs* that the extraterritoriality principle applies *only* to cases concerning price control or price affirmation statutes. Pet. App. A, 13a (citing *Ass'n des Éleveurs*, 729 F.3d at 951). Yet these opinions run contrary to the long line of this Court's precedents going back at least as far as *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and reaffirmed in *Brown-Forman* and *Healy*.

Citing *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003), the Tenth Circuit's opinion posits that the "*Baldwin* line of cases

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[5] *Amici*'s petition for certiorari (13-1313), which was supported by 13 other States, was relisted but ultimately denied.

concerns only 'price control or price affirmation statutes' that involve 'tying the price of . . . in-state products to out of state prices." *Id.*, at 669. But that is not what this Court said or even suggested. Rather, what this Court said in *Walsh* was merely that, because Maine's voluntary prescription drug rebate program did not have the "inevitable effect" of regulating the price of any out-of-state transaction, "[t]he rule that was applied in *Baldwin* and *Healy* accordingly is not applicable *to this case*." *Id.* (emphasis added).

As this Court reminded just last year, however, "The 'common thread' among those cases in which the Court has found a dormant Commerce Clause violation is that the State interfered with the natural functioning of the interstate market, either through prohibition or through burdensome regulation." *McBurney v. Young*, 133 S. Ct. 1709, 1720 (2013) (internal citation and quotation omitted). Indeed, this Court has struck down extraterritorial regulations that had nothing to do with prices, and its cases remain the supreme law of the land today. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (invalidating application of Illinois anti-takeover statute to transactions of out-of-state shareholders because, "[w]hile protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders"). Simply put, this Court has never held that the Commerce Clause *only* prohibits extraterritorial regulation of the *prices* under which commerce takes place in other States,

let alone that it somehow permits a State to dictate the production methods to be used by producers beyond its borders.

In their dissent from the denial of en banc review in *Rocky Mountain*, seven judges on the Ninth Circuit got it right when they wrote, "Now, the dormant Commerce Clause has been rendered toothless in our circuit, and we stand in open defiance of controlling Supreme Court precedent." 740 F.3d 507, 519 (2014). As this Court has explained, "The Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Unfortunately, because the Ninth and Tenth Circuits have deviated from the controlling principles set forth in *Healy*, this Court is going to have to explain these concepts once again.

This Court clearly reaffirmed in *Healy* its "established view" that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." 491 U.S. 324, 332 (1989). Despite this controlling precedent, in the circuit courts the answer appears to fluctuate depending on the vagaries of each appellate court judge, leading to different results in different jurisdictions, and even within the same circuit. This Court should therefore grant the petition for certiorari.

II. The Decisions from the Ninth and Tenth Circuits Now Allow States to Project Their Legislation Beyond Their Borders to Dictate the Production Methods to Be Used in *Other* States and Countries in the Supply of Wholesome Commodities in Interstate Commerce.

There is certainly more than one way to generate electricity — or to raise a duck — or produce most commodities. What the cases emerging from the Ninth Circuit (and now the Tenth) do is allow one State to dictate the production methods that producers in other States and countries must use as a condition to their sale. While these regulations may not reflect traditional economic protectionism, they nevertheless violate the basic principle that — in the free trade area that is the United States — one State may not close its market to interstate commerce in an effort to project its legislation into another State. *Baldwin,* 294 U.S. at 521 (1935) (striking statute that conditioned sale of milk in New York based on price paid to producers outside the state because "New York has no power to project its legislation into Vermont"). Even the Ninth Circuit has previously acknowledged the danger that dormant Commerce Clause doctrine was designed to deter. *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 998 (9th Cir. 2002) ("The Commerce Clause ... was included in the Constitution to prevent state governments from imposing burdens on unrepresented out-of state interests merely to assuage the political will of the state's represented

citizens.").

Can Colorado — consistent with the Commerce Clause — limit the supply of electricity from *other* States with the intention of selecting the sources of energy used to produce it? By the same token, can California — consistent with the Commerce Clause — penalize the sale of pure ethanol from other States with the intention of reducing greenhouse gas emissions in the Midwest? Or restrict the sale of wholesome eggs from the rest of the country with the intention of forcing farmers to enlarge the cages of hens in *other* States? Or completely ban the sale of poultry products from farmers in New York and Canada in the hope of reducing any imagined discomfort felt (if at all) by ducks in *other* States and countries? These are real cases.[6] If the Ninth and Tenth Circuit are not directed to adhere to this Court's jurisprudence on the limits of extraterritorial regulation, then their published opinions in this case and in *Ass'n des Éleveurs* will serve as a green-light for all such overreach whenever a legislature disfavors the way in which something is made.

Indeed, the consequences of these dormant Commerce Clause decisions have not gone unnoticed even by mainstream journalists. As one writes, "Normally, the Constitution prohibits such shenanigans." Dan Fisher, *California Reaches*

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[6] In addition to the instant case, the Ninth Circuit cases are *Rocky Mountain* (ethanol); *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014), docketed as Ninth Circuit Case No. 14-17111, challenging Cal. Health & Safety Code § 25996 (eggs); and *Ass'n des Éleveurs* (foie gras).

Beyond Its Borders With Rules, From Ethanol to Eggs, FORBES.COM, Dec. 20, 2013, last viewed at http://www.forbes.com/sites/danielfisher/2013/12/20/california-reaches-beyond-borders-with-its-rules-from-ethanol-to-eggs/.

* * *

It is time for this Court to address whether it meant what it said in *Healy*, *Brown-Foreman,* and *Baldwin* before the opinions in the Ninth and Tenth Circuits in this case and in *amici*'s case lead other courts and State legislatures to further defy this Court's precedents.

CONCLUSION

For the foregoing reasons and for those stated in the petition for certiorari, the petition in this case should be granted.

Respectfully submitted,

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