Case No. 07-962

IN THE
Supreme Court of the United States

CAVEL INTERNATIONAL, INC., *et al.*,

Petitioners,

v.

LISA MADIGAN, *et al.*,

Respondents.

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Petitioners have demonstrated that the ruling below conflicts with decisions of this Court and other courts of appeals on important questions of national and international importance under the Foreign Commerce Clause. Several *amici*, including the Kingdom of Belgium, industry and trade associations, and various organizations that promote the welfare of horses, underscore the far-reaching effects of the Seventh Circuit's ruling. In their opposition, Respondents contend that a state law halting all commerce from the United States in an otherwise wholesome food sold only for export neither discriminates against nor burdens foreign commerce. Further, Respondents make unfounded claims that this case is not the proper vehicle for resolving the mature conflicts of authority. Their arguments lack force, studiously ignore the Seventh Circuit's reluctance to uphold the statute, and concede that H.B. 1711 discriminates against foreign commerce.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

The facts in this case are simple, straightforward, and undisputed. Cavel International operated a slaughterhouse for approximately twenty years. *All* horsemeat prepared by Cavel International for human consumption was shipped abroad. When Illinois enacted H.B. 1711, Cavel International was the only company in the country to slaughter horses and process the meat for consumption overseas. Therefore, the Illinois statute halts all foreign commerce of the United States in the market for horsemeat. Respondents do not dispute that Illinois enacted H.B.

1711 at the behest of Bo Derek and others with the avowed purpose of closing Cavel International's slaughterhouse. Indeed, statements by supporters of the legislation, which Respondents append to their opposition, confirm that the statute aims at ending foreign commerce in horsemeat, which is only "shipped overseas to places like Belgium, France and Japan" "for the sole purpose of ensuring fine dining in European restaurants." (Opp. App. 2a (statements of then-Director of the Illinois Department of Agriculture Charles Hartke and Rep. Molaro, the bill's sponsor, respectively); *see also* Opp. App. 1a ("It's past time to stop slaughtering horses in Illinois *and sending their meat overseas*") (statement of Illinois Governor Blagojevich) (emphasis added).)

Respondents invoke unsubstantiated and non-existent "evidentiary dispute[s]" and failures of proof in a transparent attempt to evade review. (Opp. 17.) But Respondents identify no disputes of fact in the record that would prevent this Court from considering the issues raised under the Foreign Commerce Clause, complicate presentation of the substantive constitutional or procedural questions presented, or otherwise make this case an unsuitable vehicle for this Court's review.

ARGUMENT

1. The Decision Below Illustrates the Need for This Court's Examination of Issues of National and International Importance under the Foreign Commerce Clause.

This case directly presents questions under the Foreign Commerce Clause that are ripe for review and do not implicate other constitutional provisions and

doctrines. Respondents' suggestion that the Seventh Circuit correctly articulated and faithfully applied this Court's Foreign Commerce Clause precedents is demonstrably wrong. For all of Respondents' voluminous discussion, the opposition spends little time addressing or acknowledging the state of Foreign Commerce Clause jurisprudence that has led lower courts and commentators to recognize the need for this Court's further examination of the field.

A. The Seventh Circuit Fundamentally Restructured the "One Voice" Test.

The court below questioned the vitality of the "one voice" inquiry established in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), which protects the overriding national interest in foreign trade, and dismissed the Belgian Foreign Minister's letter of protest to Illinois Governor Blagojevich because the letter "did not say that his government was opposing the bill." *Cavel Int'l, Inc.* v. *Madigan*, 500 F.3d 551, 558 (7th Cir. 2007); Pet. App. 14a. Likewise, Respondents argue "no weight" should be given to the views expressed by the Belgian government. (Opp. 25.) The *amicus* brief filed by the Kingdom of Belgium makes plain H.B. 1711's effect on foreign commerce and directly refutes the argument that H.B. 1711 has only a slight or *de minimis* effect on foreign commerce.

Contrary to Respondents' assertion that Belgium has only indicated that H.B. 1711 "may" violate international trade obligations (Opp. 33), the Belgian government is far less equivocal: "In short, the Kingdom believes that H.B. 1711 impinges upon US trade obligations to the Kingdom and the EU as set

forth in the GATT and other applicable treaties." (Belgium 2.) Perhaps Respondents' mis-characterizations and efforts to dismiss Belgium's *amicus* filing are not surprising, since Belgium is in a better position than Respondents to apprehend the international effects of H.B. 1711.

Of course, whether the statute actually violates the GATT does not control the "one voice" inquiry. Nor do the treaty obligations of the United States establish some sort of administrative procedure that a foreign sovereign must exhaust before this Court should consider a constitutional challenge or the *amicus* filing of a foreign sovereign, as Respondents imply. (Opp. 33.) The Foreign Commerce Clause protects the nation as a whole against the *risk* that the Illinois statute may provoke international retaliation or impede the ability of the federal government to conduct the nation's "foreign intercourse and trade." *Japan Line*, 441 U.S. at 448; *see also National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 67–68 (1st Cir. 1999), *aff'd sub nom. Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000) (citation omitted). However trivial the target of the statute might appear to Respondents, the Foreign Minister's letter and Belgium's *amicus* brief are clear evidence that such risk exists.

This Court has long recognized the historical balkanization and political cost of trade barriers that motivated adoption of the interstate Commerce Clause. *See, e.g.*, *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979). These considerations apply with even greater force in the context of foreign commerce, where the risks of retaliation and the costs of a state law fall on the nation as a whole. *See, e.g.*, *South-Central Timber*

Dev., Inc. v. *Wunnicke*, 467 U.S. 82, 92 (1984). For these reasons, the Constitution recognizes that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power," *Japan Line*, 441 U.S. at 448 (quoting *Board of Trustees of Univ. of Ill.* v. *United States*, 289 U.S. 48, 59 (1933)) – a unified national power that statutes like H.B. 1711 threaten.

B. The Seventh Circuit's Decision Conflicts with This Court's Precedents and the Law of Other Circuits.

The petition demonstrates that the decision below is contrary not only to this Court's decisions, but also to those of other courts of appeals. Respondents' attempt to reconcile the decision below with the First Circuit's ruling in *Natsios* is unavailing. Respondents rely on a false distinction between state laws that burden commerce generally and commerce with particular nations (Opp. 15) – a distinction that finds no support in the Constitution.

Additionally, Respondents overlook the important constitutional questions under the Foreign Commerce Clause on which the First and Seventh Circuit have now reached directly contrary results. (*See, e.g.*, Pet. 22–23 (vitality of *Japan Line*); 14 (weight of *amicus* filings); 21 (meaning of "discrimination").) These fundamental disagreements involve more than mere semantics, as Respondents dismissively claim (Opp. 29), and demonstrate that this case would have been decided differently under the First Circuit's stronger articulation of the governing Foreign Commerce Clause analysis.

Further, the Seventh Circuit's ruling broke ranks with this Court's precedents holding that Commerce Clause analysis looks past a statute's purported textual neutrality to determine whether it discriminates against commerce. *See, e.g.*, *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352 (1977). The undisputed facts that Cavel International operated the only horse slaughterhouse in the country and exported all of its meat overseas for human consumption – to say nothing of Respondents' own statements from the legislation's supporters – demonstrate H.B. 1711's discrimination against foreign commerce.[1, 2]

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[1] Contrary to Respondents' claim, *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), did not turn on differential treatment of intrastate and interstate commerce. Rather, like this case, *Hughes* addresses export controls and state laws that stop the free flow of commerce at their borders. (Opp. 14–15.)

[2] On May 19, 2008, in *Department of Revenue of Kentucky* v. *Davis*, No. 06-666, 553 U.S. ___ (2008), this Court upheld Kentucky's income tax exemption of interest earned on bonds issued by the commonwealth or its political subdivisions against an interstate Commerce Clause challenge. The Court's reliance on *United Haulers Association* v. *Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786 (2007), suggests that the decision is not implicated here. Further, the plurality distinguished *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984), as applying "'more rigorous' Commerce Clause scrutiny because the case involved 'foreign commerce' . . . ." *Davis*, slip op. at 19 n.17. In this way, the plurality reserves precisely the Foreign Commerce Clause questions raised by this petition regarding what that more rigorous foreign commerce scrutiny entails (*see* Pet. 15–16) and casts further doubt on Respondents' claim that the court below applied a settled framework for foreign commerce analysis (Opp. 12).

C. The Quantification Requirement Created by the Decision Below Erects Insurmountable Barriers to Foreign Commerce Clause Challenges.

The court below adopted a new quantification requirement in foreign commerce cases. *Cavel Int'l*, 500 F.3d at 558; Pet. 14a. Respondents compound this error by arguing that the Constitution requires empirical evidence of the effect of Cavel International's closing on foreign commerce and on overseas prices. (Opp. 17, 23, 24, 28.) First, the Commerce Clause imposes no such requirement. Respondents rely solely on this Court's decision in *American Trucking Associations, Inc.* v. *Michigan Public Service Commission*, 545 U.S. 429, 436 (2005). But *American Trucking* contains no requirement for quantification of a law's burden on commerce, and no court has accepted Respondents' reading of *American Trucking*. And for good reason: that case merely applies Commerce Clause principles to the record before it in a challenge to a law imposing a fee on wholly intrastate hauling. *Id.* In particular, *American Trucking* rejected a party's attempt to bootstrap on an earlier, successful Commerce Clause challenge to a different sort of trucking fee. *Id.* at 437.

In any event, Petitioners did quantify H.B. 1711's effect on foreign commerce. Because Cavel International was the only processor in the United States of horsemeat for human consumption, H.B. 1711 affects one-hundred percent of the United States export market. Even the cases on which Respondents rely concede that laws burdening the market as a whole discriminate against commerce. (Opp. 12–13.)

Further, Respondents' authority does not support a distinction between discrimination against products and commerce where, as here, there is only a single producer. (Opp. 12–13.) In fact, *Exxon Corp.* v. *Governor of Md.*, 437 U.S. 117, 127 (1978), depends on the availability of other suppliers in the market; and *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334, 347 n.11 (1992), merely reaffirms the power of states to exercise their police power to exclude inherently noxious articles, such as infested crops, from commerce. But, by prohibiting commerce in an otherwise wholesome food produced solely for export, H.B. 1711 does not promote the health, safety, or welfare of citizens of Illinois – or anywhere else.

Respondents offer no authority that states may constitutionally impose export embargos that foreclose the entirety of the nation's foreign commerce in a market. The quantification requirement adopted below erects an unprecedented obstacle to Foreign Commerce Clause challenges – one that cannot be surmounted if a state law restricting the entirety of foreign commerce survives.

2. Respondents Have Failed to Articulate a Legitimate State Interest that Justifies H.B. 1711's Burden on Foreign Commerce.

There is, as Respondents assert, a failure of proof in this case, but it is of their own making: the record demonstrates that H.B. 1711 remains an enactment in search of a rational justification. A year after enactment of the statute, Respondents are still unable to articulate a legitimate interest to defend H.B. 1711. Respondents argue that ending an inducement to slaughter "was not the only (or even the primary)

rationale on which the court upheld" H.B. 1711 (Opp. 2), but nowhere identify what the court's – or their – primary justification for the statute is and cite no authority for the novel interests created by the court below.[3]

Effectively conceding their failure to develop a proper record, Respondents employ a "kitchen sink" approach, raising every conceivable rationale, however tenuous or hypothetical – even those rejected below. (Opp. 20; *see, e.g.*, Pet. App. 77a (horse rustling).) Instead, Respondents offer only a limited discussion of the statute's legislative history, which underscores that H.B. 1711 had nothing to do with any of the *post hoc* "hypothesized justifications" suggested (Opp. 18–19).[4] And they offer no defense for the statements of H.B. 1711's supporters that the statute would not be necessary if there were domestic commerce in or consumption of horsemeat. (Opp. App. 1a–3a; Pet. 7–8, 19 n.4.) These admissions confirm the intent of H.B. 1711 actually demonstrated in the record: the law is a direct restraint against the foreign commerce of the

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[3] Nor are Respondents able to show where in the legislative or judicial record this "inducement" rationale was advanced before the Seventh Circuit itself raised it at oral argument. Respondents can go no further than claiming that inducement "was *embodied* by the State's articulated reasons for the legislation" – tacitly acknowledging that it was first raised by the court below. (Opp. 10 (emphasis added).)

[4] Contrary to the pronouncements on which Respondents rely (Opp. 4), only a handful of states (California, Oklahoma, Texas, and now Illinois) outlaw horsemeat, and no federal law bans its consumption. To the contrary, the Federal Meat Inspection Act expressly treats horses like cattle, sheep, swine, and goats for purposes of consumption and inspection. *See* 21 U.S.C. § 601(w).

United States intended to interfere with the culinary practices of foreigners.

Respondents dismiss as "speculation" the growing body of evidence that the statute has created a nationwide problem of horse abuse and neglect. (Opp. 21 n.3.) But the *amici,* which are in a superior position to inform the Court of issues adversely affecting the welfare of horses, have well documented these unfortunate consequences, belying claims that H.B. 1711 promotes animal welfare. (American Quarter Horse 10–19; LMA 4; *see also* the American Veterinary Medicine Association's website (collecting articles at http://www.avma.org/issues/animal_welfare/unwanted_horses_news_articles.asp).)

Easily lost in Respondents' opposition is the significant expansion of governmental power effected by the decision below. Foreign commentators have already recognized H.B. 1711 as "an immense expansion of government powers to extend into the regulation of the average citizen's diet or, apparently, to attempt to alter the diet patterns of other nations." Terry L. Whiting, *The United States' Prohibition of Horsemeat for Human Consumption: Is This a Good Law?* 48 Can. Vet. J. 1173, 1177 (Nov. 2007) (Office of Chief Veterinarian, Manitoba, Canada). More than that, the fact that some people may be offended by what certain foreigners eat does not justify – under the transparent guise of whatever interest Respondents now choose to advance – putting out of business a company that employed more than sixty people and lawfully operated for twenty years in compliance with applicable state and federal laws and regulations. In this respect, H.B. 1711 "imposes a death sentence on [Cavel International's] business like

a modern day bill of attainder." *Smithfield Foods, Inc.* v. *Miller*, 241 F. Supp. 2d 978, 992 (S.D. Iowa 2003).

3. Contrary to Respondents' Claims, This Case Presents an Ideal Vehicle for Review of the Questions Presented.

Only the Seventh Circuit's ruling upholding the constitutionality of H.B. 1711 prevents Cavel International from operating today.

Respondents note that, because of the Seventh Circuit's ruling, the D.C. Circuit has dismissed as moot Cavel International's appeal from a ruling that USDA's fee-for-service regulation for funding ante-mortem inspections violates the National Environmental Policy Act. However, Respondents overlook the longstanding rule that the stay pending appeal issued in that case remains in force – allowing Cavel International to operate – until issuance of the mandate. *See, e.g.*, *Merrimack River Sav. Bank* v. *City of Clay Ctr.*, 219 U.S. 527, 536 (1911).[5] Respondents also fail to recognize that dismissal on mootness grounds there results in vacatur of the district court's judgment. *See, e.g.*, *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). In short, it is the Seventh Circuit's ruling, not the status of proceedings in the D.C. Circuit, that precludes Cavel International from operating today.

Similarly, recent congressional legislation has no bearing. Respondents mischaracterize the 2008

[5] Cavel International's petition for rehearing and rehearing en banc remains pending. Cavel International requested that the D.C. Circuit hold that petition in abeyance pending a ruling from this Court on this petition for a writ of certiorari.

appropriations act, which merely continues until September 30, 2008 the status quo that gave rise to USDA's fee-for-service regulation and the litigation in the D.C. Circuit. *See* Consol. Appropriations Act, 2008, Pub. L. 110-161, § 741, 121 Stat. 1844, 1881 (2007). Even under the 2008 Act, Cavel International could operate subject to the USDA regulations at issue in the D.C. Circuit. Contrary to Respondents' claims, that act neither prohibits privately funded inspections at horse slaughter plants nor "explicitly stated the federal policy toward slaughter of horses for human consumption." (Opp. 3, 10.)

The petition raises important constitutional questions on which courts are divided. This Court has not recently considered the Foreign Commerce Clause, and has done so outside the state tax context only occasionally. There is no better vehicle to provide the guidance that will resolve these pressing issues.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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