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 THE REPUBLIC OF FRANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Republic of France is submitting this *amicus curiae* brief to urge the Court to review and reverse a Ninth Circuit preemption ruling which undermines the force and effect of nationally uniform, U.S. Department of Agriculture (USDA) standards governing the ingredients of poultry products—in this case, a category of poultry products that represents an enduring part of France's heritage and culture.

Foie gras—defined by French law as "the liver of a duck or a goose specially fattened by gavage"—is a statutorily recognized "part of the protected cultural and gastronomic heritage in France." C. RURAL ET DE LA PÊCHE MARITIME art. L.654-27-1 (Fr.) (Jan. 5, 2006). Indeed, in 2010 UNESCO designated "the gastronomic meal of the French," which often includes a serving of foie gras, as an "intangible cultural heritage of humanity."[2]

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* Republic of France certifies that no counsel for a party authored this brief in whole or part, and that 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. As required by Supreme Court Rule 37.2(a), the parties' counsel of record received timely notice of *amicus curiae*'s intent to file this brief. Petitioners' counsel of record has submitted to the Clerk a letter granting blanket consent for the filing of *amicus* briefs. Respondent's counsel of record has consented to the filing of this brief.

[2] United Nations Educational, Scientific and Cultural Organization (UNESCO), Representative List of the Intangible Cultural Heritage of Humanity, Decision of the

California's statutory ban on sale of "force-fed" foie gras—a poultry product ingredient which USDA long has approved for sale throughout the United States, *see* Pet. at 6-8—is an assault on French tradition. But this case is not only about California's legislative affront to the people of France: The Ninth Circuit's ruling that the California sales ban statute, Cal. Health & Safety Code § 25982, is not preempted by federal law poses a serious threat to USDA's ability to regulate the identity and composition (i.e., ingredients) of myriad domestic and imported poultry products, and similarly regulated meat products, in a nationally uniform manner.

Under the Poultry Products Inspection Act ("PPIA"), USDA's Food Safety and Inspection Service (FSIS), for the benefit of the public, establishes nationally uniform identity and ingredient standards for poultry products, including for foie gras. *See* FSIS, *Food Standards and Labeling Policy Book* (rev. Aug. 2005) ("*Food Standards Book*"), https://goo.gl/LiVpw5; *see also* Record Excerpts ("ER") 019-022 (same). To maintain national uniformity, and thereby prevent "interfer[ence] with the free flow of poultry products in commerce," the PPIA expressly preempts, "any State" from imposing "[m]arking, labeling, packaging, or *ingredient* requirements . . . in addition to, or different than, those made under [the Act]." 21 U.S.C. § 467e (emphasis added). California's prohibition against the sale of poultry products containing force-fed foie gras directly conflicts with

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Intergovernmental Committee, 5.COM 6.14 (Nairobi, 2010), https://goo.gl/xFTfsd.

the PPIA's broadly and plainly worded federal preemption provision. The Court's review is needed because the Ninth Circuit essentially held that California (or any other State) has free rein to undermine national uniformity whenever and however it chooses by imposing—under the guise of barring a method of production—its own additional or different poultry product ingredient requirements (here, § 25982's requirement that poultry products sold in California not contain foie gras "if it is the result of force feeding").

France is particularly interested in the federal preemption question presented by this case for at least three reasons. *First*, California's outright ban on the sale of force-fed foie gras products unjustifiably disparages an integral part of French culinary and social heritage. *Second*, USDA's foie gras product identity and ingredient standards mirror the corresponding French standards. To promote and preserve the authenticity of foie gras, France requested USDA, and USDA agreed almost 45 years ago, to adopt the French standards for foie gras. *See* Pet. at 7; ER023-024. *Third*, and most important, if the Ninth Circuit's PPIA preemption opinion is allowed to stand, the sale of USDA-approved poultry (or meat) products that either are exported from France or other nations to the United States—or are produced here but are identical or substantially similar to French or other foreign-produced products—will be left vulnerable to the political whims of fifty different state governments.

SUMMARY OF ARGUMENT

"Put simply, federal law preempts contrary state law." *Hughes v. Talen Energy Marketing Co.*, 136 S. Ct. 1288, 1297 (2016). That is the case here. California's ban on the sale of force-fed foie gras, Cal. Health & Safety Code § 25982, imposes that State's own, additional and/or different ingredient requirement for foie gras products (i.e., the requirement that such products not contain foie gras resulting from the force feeding of ducks or geese). The state statute, therefore, is contrary to, and invalidated by, the PPIA's express preemption provision, 21 U.S.C. § 467e, whose purpose is to maintain, *inter alia*, national uniformity of poultry product ingredient standards, which are established solely by USDA.

California's statute also is contrary to the PPIA because it undermines the national uniformity of USDA's poultry product ingredient standards, including but not limited to, USDA's standards for foie gras. The state statute, therefore, is impliedly as well as expressly preempted.

The USDA foie gras ingredient standards, which the California statute for all practical purposes repudiates, are especially important to *amicus curiae* Republic of France. Those standards are the same as the French standards for foie gras, and were adopted by USDA at France's urging to ensure that foie gras sold in the United States is true to tradition. Allowing California's foie gras sales ban to go into effect would denigrate a classic food product that is culturally as well as economically important to France.

ARGUMENT

The Court should grant review because the Ninth Circuit's flawed preemption analysis undermines USDA's nationally uniform standards for poultry product ingredients

A. The PPIA's express preemption provision mandates national uniformity of poultry product ingredients

The preemption provision at issue in this appeal declares 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. To achieve and maintain national uniformity, this expansive and unambiguous preemption language bars a State from doing *exactly* what California has done here by banning the sale of the same force-fed foie gras poultry products that USDA product identity and ingredient standards allow.

"When a federal law contains an express preemption clause . . . the plain wording of the clause . . . necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011) (internal quotation marks omitted). Further, contrary to the Ninth Circuit's recitation of preemption principles, App. 10a, "an 'assumption' of nonpre-emption is *not* triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (emphasis added). As the Ninth Circuit's

opinion notes, Congress originally enacted the PPIA more than 60 years ago. *See* App. 6a.

This Court repeatedly has emphasized that where, as here, a federal statute expressly prohibits a State from imposing requirements that are in addition to or different than federal requirements, the provision's preemptive scope is expansive. *See, e.g.*, *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 459 (2012) (holding that the Federal Meat Inspection Act ("FMIA") preemption provision, which is identical to the PPIA preemption provision, "sweeps widely" and bars a California statute banning the sale of products derived from nonambulatory pigs); *see also Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) (applying a "different from, or in addition to" Medical Device Amendments preemption provision to state requirements imposed by product liability law); *Bates v. Dow AgroSciences, LLC*, 544 U.S. 431, 443 (2005) (holding that under the Federal Insecticide, Fungicide, and Rodenticide Act's preemption provision, a state-imposed labeling requirement is "in addition to or different from" federal labeling requirements unless it is "equivalent" or "parallel" to the federal statute's misbranding provisions); *cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 502, 521 (1992) (Public Health Cigarette Smoking Act provision expressly preempting a State from imposing a "requirement or prohibition" relating to cigarette advertising or promotion "sweeps broadly").

Here, the legislative history of the PPIA's sweeping preemption provision confirms that its primary purpose is to achieve and maintain national uniformity. *See Nat'l Broiler Council v. Voss*, 44 F.3d

740, 744 (9th Cir. 1995) (citing H.R. Rep. No. 90-1333, *reprinted in* 1968 U.S.C.C.A.N. 3426) (holding that the PPIA expressly preempts a California poultry labeling statute). Congress enacted the PPIA in 1957, thereby "establishing a comprehensive federal program for the regulation of poultry products." *Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 295 (5th Cir. 1994). The statute was amended in 1968, including by adding the § 467e preemption provision, in part to "maintain[] uniformity regarding the *inter* state sale of domestic poultry products . . . according to [the] uniform federal standards." *Id.* at 296; *see also* 1968 U.S.C.C.A.N. at 3442 (Statement of Ass't Sec. of Agric. George L. Mehren) ("States would be precluded from imposing additional or different labeling or packing or ingredient requirements. . . . Both industry and consumers would greatly benefit from these changes . . . .").

FMIA case law also is instructive since, as the Ninth Circuit acknowledged here, the FMIA and the PPIA contain "parallel preemption clauses." App. 22a. It bears repeating that this Court in *National Meat Association v. Harris* explained that "[t]he FMIA's preemption clause [21 U.S.C. § 678] sweeps widely." 565 U.S. at 459. In *Armour and Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972), the court of appeals, referring to "the clear and complete preemption ordained by Congress," held that certain provisions of a Michigan statute regulating sausage ingredients were preempted by the FMIA (as amended by the Federal Wholesome Meat Act of 1967). *Id.* at 85. In so doing, the court indicated that "[t]he Federal Act itself manifests a congressional intent to prescribe

uniform standards of identity and composition." *Id.* at 83 (emphasis added). Further, the court explained that "[t]his assessment of congressional intent is reinforced by later congressional action in amending the Poultry Products Inspection Act [by] add[ing] the precise preemptive language of Section 678 of the Federal Wholesome Meat Act." *Id.* at 85.

B. The PPIA expressly preempts California's ban on sale of force-fed foie gras

The district court correctly held that California Health & Safety Code § 25982 is expressly preempted because it "imposes an ingredient requirement in addition to or different than the federal laws and regulations." App. 44a.

1. The California statute imposes a foie gras ingredient requirement that is in addition to or different than USDA's requirements

- The California statute imposes an ingredient *requirement* because it establishes "a rule of law that must be obeyed." *Bates*, 544 U.S. at 445. More specifically, the state statute "set[s] a standard," *id.* at 446, for lawful sale of certain types of foie gras products: Under § 25982, a foie gras product cannot be lawfully 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."

- The California statute imposes an ingredient requirement that is *in addition to, or different than* USDA's ingredient requirements for foie gras products. As the petition explains, USDA's *Food Standards Book* prescribes ingredient requirements

for at least 14 types of poultry products consisting in whole or part of duck liver or goose liver foie gras. *See* Pet. at 7; ER020-022. USDA classifies those products based "on the minimum duck liver or goose liver foie gras content." ER020. For example, products identified as "Block of Goose Foie Gras" or "Parfait of Duck Foie Gras" are "composed of a minimum 85 percent goose liver or duck liver foie gras," although parfaits may contain mixtures of both. ER021. "Puree of Duck Liver" or "Pate of Goose Liver," however, need contain only "a minimum of 50 percent duck liver and/or goose liver foie gras." *Id*.

Unlike the California statute, USDA's standards nowhere require that foie gras products consist of fattened duck or goose livers that are not the result of force feeding. Indeed, the USDA *Food Standards Book* states that "[g]oose liver and duck liver foie gras (fat liver) are obtained exclusively from *specially fed and fattened* geese and ducks." ER020 (emphasis added). Not surprisingly, France's understanding is that the record contains uncontested evidence that this foie gras definition, which France suggested to USDA, encompasses the centuries-old practice of feeding ducks or geese by oral gavage. *See* Supplemental Record Excerpts ("SER") at 041, 047-048. The California statute is preempted, therefore, because it imposes an additional or different ingredient requirement for foie gras products.

2. Contrary to the Ninth Circuit's strained preemption analysis, the California statute relates to a poultry product ingredient

The "Foie Gras Products" section of the *Food Standards Book* indisputably demonstrates that USDA regulates foie gras as a poultry product *ingredient* by specifying minimum goose or duck liver foie gras content in various products. *See* ER020-021. Foie gras, therefore, falls squarely within the Ninth Circuit's own definition of "ingredient" for PPIA purposes: "a physical component of a poultry product." App 12a. Yet, the Ninth Circuit's express preemption analysis is premised on the implausible notion that the California statute does not impose an additional or different *ingredient* requirement.

According to the court of appeals, § 25982 "addresses a subject entirely separate from any 'ingredient requirement': how animals are treated long before they reach the slaughterhouse gates." App. 16a. The court's opinion asserts that "[t]he difference between foie gras produced with force-fed birds and foie gras produced with non-force-fed birds is not one of ingredient. . . . the difference is in the treatment of the birds *while alive*." *Id.*

At best the Ninth Circuit's interpretation of § 25982 is "hypertechnical and inconsistent with the language and purpose of the PPIA." *Nat'l Broiler*, 44 F.3d at 743. In fact, this Court rejected a similar argument in *National Meat* when it explained that avoiding the FMIS preemption provision "just by framing [the California statute] as a ban on the sale of meat produced in whatever way the State

disapproved . . . would make a mockery of the . . . preemption provision." 565 U.S. at 464.

Along the same lines, the district court indicated here that "the need to prevent states from avoiding preemption via strategic legislative drafting applies with equal force to § 25982. . . . California cannot regulate foie gras products' ingredients by creatively phrasing its law in terms of the manner in which those ingredients were produced." App. 46a, 49a. In reality, as the district court explained, § 25982 (unlike California Health & Safety Code § 25981) "does not ban the practice of force feeding"; instead, § 25982 "expressly regulates only the sale of products containing certain types of foie gras products—i.e., foie gras from force-fed birds." App. 43a.

According to the Ninth Circuit, the PPIA preemption provision does not apply also because "if a state bans a poultry product like foie gras, there is nothing for the PPIA to regulate." App. 18a. This Court, however, rejected, albeit in an implied preemption context, similarly circular logic in *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 133 S. Ct. 2466, 2477 (2013) (criticizing a "'stop-selling' rationale as incompatible with our pre-emption jurisprudence").

C. The California statute is impliedly preempted because it directly conflicts with USDA's nationally uniform poultry product ingredient standards

The categories comprising the Court's preemption lexicon are not "rigidly distinct." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990). As is the case here, "the existence of an 'express pre-emption

provisio[n] does *not* bar the ordinary working of conflict pre-emption principles.'" *Arizona v. United States*, 567 U.S. 387, 406 (2012) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-72 (2000)).

California's ban on sale of poultry products containing force-fed foie gras is impliedly as well as expressly preempted. California Health & Safety Code § 25982 is contrary to federal law not only because it does precisely what the PPIA's preemption provision expressly prohibits, but also because it conflicts with the PPIA's scheme for establishment and enforcement of nationally uniform "definitions and standards of identity or composition" for poultry products. 21 U.S.C. § 457(b)(2); *see* Pet. at 6-8.

1. To ensure authenticity, USDA's foie gras standards are the same as the French foie gras standards

The detailed foie gras product ingredient standards set forth in USDA's *Food Standards Book* have special significance to *amicus curiae* Republic of France. Each listed product is identified by both its "French Product Name" and "Acceptable English Product Name." *See* ER020-021. Even more important, the well-established foie gras ingredient requirements for the products listed in the *Food Standards Book* are virtually the same as the corresponding French foie gras standards.

The identicality between the USDA and French foie gras standards is not a coincidence. It is intended to ensure that regardless of whether they are produced domestically or abroad, foie gras products sold in the United States will contain the

same genuine fattened goose or duck liver ingredients found in French foie gras.

The USDA foie gras standards reference "Policy Memo 076 dated September 21, 1984." ER022. That Policy Memo, which is included in the record at ER024, was issued by the Director of USDA's Standards and Labeling Division, Meat and Poultry Inspection Technical Services. *Id.* In the section entitled "POLICY," the USDA memo states as follows: "Goose liver and duck liver foie gras (fat liver) are obtained exclusively from specially-fed and fattened geese and ducks." ER023. The Policy Memo then classifies foie gras products into three groups—the same groups that appear in USDA's *Food Standards Book*—"based on the minimum duck liver or goose liver foie gras content." *Id.*

The Policy Memo also includes a section entitled "RATIONALE." That section explains that

> [i]n 1975, representatives of the French government petitioned the USDA to adopt the [1973] French standards for foie gras products. An agreement was reached between our respective governments to follow these standards . . . over the years the French standards [revised in 1980] were followed and applied to foie gras products.
>
> ***
>
> The adoption of these requirements will eliminate confusion and provide a descriptive classification for these products.

ER024. A letter dated May 17, 1983 from the Director of the Standards and Labeling Division to the French Embassy reconfirmed that USDA would continue "to follow the French regulations" and "to monitor all 'foie gras' products entering this country for compliance with the French regulations, and will also continue to deny approval for any of these products which are not in compliance with these standards." SER037.

2. The California statute interferes with the system of nationally uniform poultry product ingredient standards that Congress directed USDA to establish and maintain under the PPIA

The PPIA establishes, "for the protection of the public," a nationally uniform system of poultry "definitions and standards of identity or composition." 21 U.S.C. § 457(b)(2)); *see also* 9 C.F.R. § 381.155(a)(1) (same). As discussed above, those definitions and standards—including for poultry products containing foie gras "obtained *exclusively* from *specially fed and fattened* geese and ducks," ER020 (emphasis added)—are set forth in the USDA *Food Standards Book*.

By enacting a ban on sale of poultry products containing force-fed foie gras, California not only is violating the PPIA's express preemption provision, but also, for all practical purposes, rejecting USDA's (and France's) long-standing ingredient standards for foie gras products. The fact that *California*, the nation's most populous state, has sought to enforce a force-fed foie gras sales ban exacerbates the degree to which that ban undermines the national uniformity,

integrity, and force and effect, of USDA's poultry product ingredient standards, not only for foie gras, but for all poultry products.

Since USDA has decided, as a matter of policy, to adopt the French foie gras standards as its own, the California statute necessarily impugns the French standards too. More fundamentally, when France and USDA negotiate and reach agreements regarding export or import of agricultural products, lower levels of government (e.g., the State of California) should not be permitted to undermine the utility of such agreements by banning sale of products which USDA allows to be sold, or jeopardize the process by which such agreements are reached.

The Ninth Circuit's superficial obstacle preemption analysis, *see* App. 25a-26a, rings hollow in the absence of any discussion, or even acknowledgement, that USDA's poultry product ingredient standards are intended to foster a nationally uniform, USDA-administered scheme. Nor does the court's opinion appear to comprehend the fundamental, national uniformity-related purpose of the PPIA's express prohibition against any State imposing its own, additional or different ingredient requirements. Moreover, insofar as the court's opinion alludes to "the states' role in poultry regulation," *id.* at 24a, namely state poultry inspection programs, that fails to address USDA's exclusive role in standard setting for poultry product ingredients.

As the petition emphasizes, the preemption issue in this case has far-reaching significance for the operation of USDA's poultry and meat programs.

California, like any other State, is subject to the Supremacy Clause. It cannot enact, and should not be permitted to enforce, laws that defy and undermine regulatory authority that Congress has vested exclusively in USDA or other federal departments or agencies.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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