

No. 22–472

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**In The  
Supreme Court of the United States**

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ASSOCIATION DES ÉLEVEURS DE CANARDS ET D'OIES  
DU QUÉBEC, ET AL.,  
*Petitioners,*

v.  
ROB BONTA, 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 AMICUS CURIAE REPUBLIC OF  
FRANCE IN SUPPORT OF PETITIONERS**

— ◆ —  
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**TABLE OF CONTENTS**

**Page**

TABLE OF AUTHORITIES ..... iii

INTEREST OF AMICUS CURIAE .....1

SUMMARY OF ARGUMENT.....3

ARGUMENT .....4

The Court should grant certiorari because California’s foie gras ban thwarts a negotiated agreement between the Executive Branch and a foreign nation, undermining the federal government’s ability to speak with one voice on foreign affairs. ....4

    A. Agreements between the Executive Branch and foreign nations preempt any conflicting state laws. ....4

    B. The United States agreed with France to adopt the French definition of foie gras for the United States market. ....6

    C. This Court should grant certiorari because California’s law banning foie gras from “force-fed” poultry conflicts with the United States’ agreement to adopt the French definition of foie gras. ....9

CONCLUSION.....11

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>American Insurance Ass’n v. Garamendi</i> , 539 U.S. 396 (2003).....	5
<i>Arizona v. United States</i> , 567 U.S. 387 (2012).....	5
<i>Butz v. Economou</i> , 438 U.S. 478 (1978).....	8
<i>Crosby v. Nat’l Foreign Trade Council</i> , 530 U.S. 363 (2000).....	5
<i>Japan Line, Ltd. v. County of Los Angeles</i> , 441 U.S. 434 (1979).....	4, 5
<i>Michelin Tire Corp. v. Wages</i> , 423 U.S. 276 (1976).....	4
<i>Nat’l Broiler Council v. Voss</i> , 44 F.3d 740 (9th Cir. 1994).....	8
<i>United States v. Locke</i> , 529 U.S. 89 (2000).....	5
<i>United States v. Pink</i> , 315 U.S. 203 (1942).....	5

<i>Zivotofsky ex rel. Zivotofsky v. Kerry</i> , 576 U.S. 1 (2015).....	4
---	---

### **Statutes**

California Health and Safety Code § 25982 .....	3, 9
Code rural et de la pêche maritime art. L654-27-1 .....	1

### **Miscellaneous**

Food & Safety Inspection Serv., Policy Memo 076 (1984).....	8
<i>Food Standards and Labeling Policy Book</i> (rev. web ed. 2005), USDA, <a href="https://www.fsis.usda.gov/sites/default/files/import/Labeling-Policy-Book.pdf">https://www.fsis.usda.gov/ sites/default/files/import/Labeling- Policy-Book.pdf</a> .....	6, 8
<i>Gastronomic Meal of the French</i> , UNESCO, <a href="https://ich.unesco.org/en/RL/gastronomic-meal-of-the-french-00437">https://ich.unesco.org/en/RL/gastron omic-meal-of-the-french-00437</a> .....	2

**INTEREST OF AMICUS CURIAE<sup>1</sup>**

The Republic of France submits this amicus brief to urge the Court to review and reverse a Ninth Circuit preemption ruling that undermines the 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 that the federal government has worked with France to protect. The Ninth Circuit’s decision also undermines the diplomatic process by which agreements between nations are reached, such as the USDA’s agreement to adopt French standards governing foie gras that was the fruition of its negotiations with French representatives. This Court’s review will help to assure foreign governments that they can reliably negotiate with the United States government to address issues of common interest.

Foie gras—defined by French law as the liver of a duck or a goose specially fattened by gavage—is statutorily recognized as part of the cultural and gastronomic heritage protected in France.<sup>2</sup> Code rural et de la pêche maritime art. L654-27-1. Indeed, “the gastronomic meal of the French,” which often includes a

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<sup>1</sup> No party’s counsel authored this amicus brief in whole or in part. No one other than the Republic of France or its counsel contributed money to prepare or submit this brief. After timely notice, all parties consented in writing to the filing of this brief.

<sup>2</sup> In the original French: “Le foie gras fait partie du patrimoine culturel et gastronomique protégé en France. On entend par foie gras, le foie d’un canard ou d’une oie spécialement engraisé par gavage.” Code rural et de la pêche maritime art. L654-27-1.

serving of foie gras, has been designated by UNESCO as an “Intangible Cultural Heritage of Humanity.”<sup>3</sup>

California’s statutory ban on sale of “force-fed” foie gras—a poultry product ingredient which the USDA long has approved for sale throughout the United States—is an assault on French culture and tradition. At France’s request, the USDA agreed more than 45 years ago to adopt the French standards for foie gras, which recognize that foie gras must be obtained from “specially-fed and fattened” geese and ducks. Thus, California is not seeking to prohibit the sale of only some types of foie gras. To the contrary, its ban is total—*all* foie gras necessarily requires the gavage of ducks and geese to fatten their livers.

If the Ninth Circuit’s preemption opinion is allowed to stand, it would allow California to undermine an agreement between the Executive Branch of the federal government and a foreign nation. Moreover, the sale of any USDA-approved poultry (or meat) products that are exported from France or other nations to the United States—or are produced in the United States 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.



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<sup>3</sup> *Gastronomic Meal of the French*, UNESCO, <https://ich.unesco.org/en/RL/gastronomic-meal-of-the-french-00437> (last visited Dec. 14, 2022).

## SUMMARY OF ARGUMENT

As the USDA recognizes, foie gras must be the product of force-fed geese or ducks. This USDA requirement resulted from diplomatic negotiations between the U.S. federal government and the Republic of France, which led to the USDA's adoption of French standards for defining foie gras products. Notwithstanding the federal policy to the contrary, California enacted California Health and Safety Code section 25982, which prohibits the sale of force-fed foie gras.

Review is warranted not only for the reasons emphasized in the petition, but also because California's statute undermines the ability of the federal government to speak with one voice on matters touching on international relations. The Republic of France—continuing a tradition of French-American diplomatic relations and cooperation dating back to the Revolutionary War—negotiated with the United States federal government so that it would adopt the USDA foie gras ingredient requirements that protect France's industry and cultural heritage in foie gras. California's decision to thwart that agreement raises important concerns about a state's ability to contravene the foreign policy decisions of the federal government, which diminishes the potential for international cooperation on many matters of global importance.





**ARGUMENT**

**The Court should grant certiorari because California’s foie gras ban thwarts a negotiated agreement between the Executive Branch and a foreign nation, undermining the federal government’s ability to speak with one voice on foreign affairs.**

**A. Agreements between the Executive Branch and foreign nations preempt any conflicting state laws.**

The Framers of the Constitution recognized that “the Federal Government must speak with one voice when regulating commercial relations with foreign governments.” *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976). More broadly, the need for the United States to speak with “one voice” on matters affecting international relations informs the Court’s analysis when considering a wide range of legal doctrines. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 14 (2015) (separation of powers); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (negative Foreign Commerce Clause); *Michelin Tire*, 423 U.S. at 285 (Import-Export Clause). By considering the need for federal uniformity in matters touching on foreign affairs, the Court helps prevent individual states from taking actions that might create international disharmony or outright conflict, or produce a patchwork of state regimes that work to the

detriment of the nation as a whole. *See Japan Line*, 441 U.S. at 450–51.

Most relevant to this case, the federal government’s ability to make policy affecting relationships with foreign governments—without interference from state governments—is an important consideration in resolving questions of federal preemption. *See Arizona v. United States*, 567 U.S. 387, 409–10 (2012) (holding that an Arizona law authorizing state officers to decide whether an alien should be detained for being removable was preempted); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381, 388 (2000) (holding that a Massachusetts law restricting the authority of its agencies to purchase from companies doing business with Burma was preempted); *United States v. Locke*, 529 U.S. 89, 94, 103–04 (2000) (holding that Washington regulations regarding maritime tanker transports were preempted).

The preemptive “one voice” with which the federal government speaks may come from the Executive Branch even in the absence of a Senate-approved treaty. For instance, in *American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 415–16, 424–25 (2003), the Court held that California’s Holocaust Victim Insurance Relief Act of 1999 was preempted because it conflicted with federal Holocaust victim compensation policy, as expressed in a number of executive agreements entered into with formerly belligerent foreign nations. And in *United States v. Pink*, 315 U.S. 203, 222, 238–40 (1942), the Court held that conventional state rules governing corporations were preempted by an executive agreement settling claims arising from the Russian Revolution.

Collectively, the above authorities teach that if a state law interferes with agreements between the Executive Branch and foreign nations, the conflict raises important concerns and the state law should be preempted.

**B. The United States agreed with France to adopt the French definition of foie gras for the United States market.**

The detailed foie gras product ingredient standards set forth in USDA's *Food Standards and Labeling Policy Book* have special significance to the Republic of France. Each listed product is identified by both its "French Product Name" and "Acceptable English Product Name." U.S. Dep't of Agric., *Food Standards and Labeling Policy Book* 54 (rev. web ed. 2005) (capitalization omitted), <https://www.fsis.usda.gov/sites/default/files/import/Labeling-Policy-Book.pdf>. Moreover, the well-established foie gras ingredient requirements for the products listed in the *Food Standards and Labeling Policy Book* are virtually the same as the corresponding French foie gras standards.

The identity between the USDA and French foie gras standards is not a coincidence. The USDA standards are the result of more than 45 years of coordination between the United States and French authorities. The two nations intended to ensure that regardless of whether foie gras foodstuffs are produced domestically or abroad, any foie gras sold in the United States will contain the same genuine fattened goose or duck liver ingredients found in French foie

gras. We explain the history of agreements between the United States and France below.

In 1973, the French government and trade associations promulgated standards for foie gras products. *See* SER-211.

In 1975, representatives of the French government petitioned the USDA to adopt the French standards. *Id.* The United States and France agreed that the United States would follow these standards pending a rulemaking procedure. *Id.* Although a rulemaking was not finalized at that time, the United States followed and applied the French standards over the ensuing years. *Id.* Eventually, however, the standards for foie gras products became obsolete while at the same time the marketing and consumption of foie gras became more popular. *Id.*

In 1980, the French government and trade associations revised the 1973 standards for foie gras products and requested that the United States adopt France's new regulations. *Id.*

In 1983, the French Embassy sent documents to the Standards and Labeling Division (SLD) of USDA's Food Safety and Inspection Service proposing various requirements for foie gras products, including requiring that foie gras "must exclusively come from specially crammed and suitably bled geese and ducks."<sup>4</sup> SER-191–92, 208; *see* SER-196. The SLD

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<sup>4</sup> In the original French: "Les foie gras doivent provenir exclusivement d'oies ou de canards, spécialement gavés et convenablement saignés." SER-192.

reviewed the documents and proposed an “arrangement between our respective governments.” SER-196. Namely, the SLD would be “willing to follow” the 1980 French foie gras regulations, with minor modifications that did not change the basic definition of “foie gras.” *Id.* The SLD Director wrote that he hoped France would find the proposal “acceptable as an agreement between our two governments.” SER-197.

In 1984, the Food Safety and Inspection Service issued Policy Memo 076, stating that the SLD had decided to follow the 1980 French requirements with only minor modifications. SER-211; *see* SER-193. Consistent with the French regulations, the Policy Memo required that foie gras is liver “obtained exclusively from specially-fed and fattened geese and ducks.” SER-210; *see Nat’l Broiler Council v. Voss*, 44 F.3d 740, 747 (9th Cir. 1994) (giving USDA Policy Memo controlling weight as agency’s interpretation of its own regulations).

The USDA has never sought to withdraw from its agreement with France to adopt the French definition of foie gras. To the contrary, the USDA continues to define foie gras as “liver . . . obtained exclusively from specially fed and fattened geese and ducks,” U.S. Dep’t of Agric., *supra*, at 53, and has elsewhere explained that “specially fed and fattened” means force-fed. *See* Pet. App. 11.

Accordingly, the USDA’s agreement with France to coordinate the definition of “foie gras” as the product of force-fed geese or ducks has remained the policy of the Executive Branch for nearly half a century. *See Butz v. Economou*, 438 U.S. 478, 480 (1978)

(observing that the USDA is an agency within the Executive Branch of the federal government).

**C. This Court should grant certiorari because California’s law banning foie gras from “force-fed” poultry conflicts with the United States’ agreement to adopt the French definition of foie gras.**

The petition explained how California’s law *prohibiting* foie gras that “is the result of force feeding,” Cal. Health & Safety Code § 25982, conflicts with the federal policy discussed above that *requires* foie gras to be the result of force feeding. *See* Pet. 11–12, 22–30. The petition also explained how California’s law is preempted because it imposes an ingredient requirement that is additional or different from the federal requirements, and because it violates the dormant Commerce Clause’s restrictions on extraterritorial regulation. *See* Pet. 30–33. The Republic of France agrees with petitioners and urges this Court to grant certiorari so that it can reverse the Ninth Circuit’s contrary decision.

Alongside the concerns highlighted in the petition, it is also important to emphasize the international dimension of the problem that California’s law creates. French farmers, like farmers in other nations, understand and practice traditional methods of animal husbandry whose roots can be traced back hundreds of years. And yet, California is attempting to control the conduct of farmers everywhere in the

world, even when its regulations have no discernable benefit on the health and safety of California citizens.

The federal government of the United States has decided to coordinate with France to protect the integrity of traditional foie gras products. *See supra* Part B. Those coordination efforts are thwarted by California's attempt to impose its own views of what foie gras must be,<sup>5</sup> raising important concerns touching on international relations that support this Court's review. *See supra* Part A.

The fact that *California*, the nation's most populous state, has sought to enforce what amounts to a foie gras sales ban exacerbates the degree to which that ban undermines the national uniformity, integrity, and force and effect of the USDA's poultry product ingredient standards. And since the 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.

When France and the USDA negotiate 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 the sale of products that USDA allows to be sold, or jeopardize the diplomatic process by which such agreements are reached. Even more universally, foreign governments' ability to work with and rely upon the United

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<sup>5</sup> California's view that foie gras can exist without the force-feeding of poultry is entirely unfounded—no such product exists. SER 185–88.

States government to address *any* issue of international importance is undermined if individual states within the United States can enforce laws that frustrate those efforts.



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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