

No. 10-224

**In The
SUPREME COURT OF THE UNITED STATES**

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, *et al.*,

Respondents.

**On Writ of Certiorari To The
United States Court of Appeals
For the Ninth Circuit**

**BRIEF OF *AMICI CURIAE* TIM BLACKWELL,
D.V.M. and KRISTIE MOZZACHIO, D.V.M. IN
SUPPORT OF RESPONDENTS**

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I. INTEREST OF THE *AMICI CURIAE*

Tim Blackwell, D.V.M. and Kristie Mozzachio, D.V.M. submit this brief as *amici curiae* in support of the Respondents.¹

Dr. Blackwell has over thirty-three years of veterinary medicine experience with an expertise in swine health, an area in which he obtained a Doctor of Philosophy degree from the University of Minnesota. He has been on the faculty and taught courses at the University of Minnesota and Ontario Veterinary College. Dr. Blackwell is currently a veterinary scientist for the Ontario Ministry of Agriculture and Food. He has published and presented many articles and papers and is a member of a number of professional veterinary organizations including the American Association of Swine Veterinarians and the Ontario Association of Swine Practitioners. Dr. Mozzachio is a certified veterinary pathologist with specific expertise in swine diseases. She has a veterinary practice devoted exclusively to the care of pigs, is an adjunct faculty member of North Carolina State University's Veterinary Teaching Hospital, and

¹ Petitioner and Respondents have consented to the filing of this brief after receiving timely notice from the *amici curiae*. As required by SUP. CT. R. 37.6, Dr. Blackwell and Dr. Mozzachio state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

provides pathology-related consulting services to various laboratories in North Carolina.

As professional swine veterinarians, Dr. Blackwell and Dr. Mozzachio have an interest in the humane treatment of the animal species to which they have devoted their professional lives and in insuring that any decision rendered by the Court is based upon accurate and objective science. Through this *amicus curiae* brief, Dr. Blackwell and Dr. Mozzachio specifically seek to correct the erroneous claims relating to the human health and safety issues raised in the briefs of Petitioner and its *amici*. Given their particular knowledge, training, and expertise, Dr. Blackwell and Dr. Mozzachio are well positioned to explain why the implementation of California Penal Code Section 599f (“Section 599f”) does not pose any risk to human health and safety and why its enforcement would encourage more humane treatment of pigs. Therefore, Dr. Blackwell and Dr. Mozzachio respectfully request that the Court affirm the judgment of the Court of Appeals.

II. SUMMARY OF ARGUMENT

The primary purpose of this *amicus* brief is to insure that the Court understands that Section 599f does not pose any risk to human health and thus does not interfere with what Petitioner refers to as the “one basic and fundamental objective” of the Federal Meat Inspection Act (“FMIA”) — “to insure the wholesomeness and cleanliness of the entire meat supply in th[e] United States.” Brief for Petitioner on Writ of Certiorari at 3-4, *Nat’l Meat Ass’n. v. Harris*,

No. 10-224 (9th Cir. Aug. 22, 2011) (quoting 113 CONG. REC. 30512 (1967) (statement of Rep. May)) (“Petitioner’s Brief”). *Amici* also seek to inform the Court that the immediate euthanization of non-ambulatory pigs required by Section 599f will in fact encourage more humane treatment of swine before they ever reach the premises of a slaughterhouse.

III. EUTHANIZING DOWNED PIGS BEFORE THEY ARE OFFERED FOR SLAUGHTER DOES NOT THREATEN PUBLIC HEALTH IN THE SLIGHTEST AND THUS DOES NOT INTERFERE WITH THE POLICY UNDERLYING THE FEDERAL MEAT INSPECTION ACT

A. The Purpose of The FMIA Is To Protect Public Health, Not Industry Profits

There can be no doubt that the FMIA was enacted “to prevent the shipment of impure, unwholesome and unfit meat and meat food products in interstate and foreign commerce.” *Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4-5 (1918). Indeed, Petitioner accurately reports not only the impetus for the first Meat Inspection Act as the response to concerns over unhealthful meat created by publication of *The Jungle*, but also that the comprehensive set of regulations promulgated to implement the FMIA was for the purpose of preventing the use in commerce of meat and meat food products which are adulterated. Petitioner’s Brief at 41.

Significantly, the FMIA was not enacted to protect profits when methods of production become, in the judgment of a State, inhumane. Instead, its purpose, and accordingly the animating rationale for its preemptive scope, are the protection of public health. *United States v. Stanko*, 491 F.3d 408, 417 (8th Cir. 2007) (“[D]espite the fact that the FMIA statutory scheme necessarily involves regulating business and may have the effect of protecting consumers and competition from economic harm, we conclude that the primary purpose of the FMIA is to protect public health from the effects of unwholesome meat.”); *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) (“[T]he very purpose of the FMIA and FFDCA...is to ensure the safety of the nation’s food supply and minimize the risk to public health from potentially dangerous food and drug products.”); *United States v. Mullens*, 583 F.2d 134, 139 (5th Cir. 1978) (“The purpose of the Meat Inspection Act of 1907, as amended, of which the present section 622 is a part, is to ensure a high level of cleanliness and safety in meat products.”); *G.A. Portello & Co., Inc. v. Butz*, 345 F. Supp. 1204, 1207-08 (D.D.C. 1972) (“It is clear...that the policy of the [Federal Meat Inspection] Act and the regulations is above all to protect the health and welfare of consumers.”).²

² The other purpose of the FMIA, as amended by the Humane Methods of Slaughter Act of 1978, cited by Petitioner, is to ensure that all livestock offered for slaughter are handled and killed humanely. However, there can be no plausible claim that Section 599f’s requirement of immediate euthanization (the most humane treatment conceivable for a non-ambulatory

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**B. The Implication of Petitioner And Its
Amici That Human Health Is Jeopardized
By Penal Code Section 599f Is False**

The briefs of Petitioner and its *amici* contain repeated innuendoes, completely unsupported by any evidence or scientific sources, that Section 599f's requirement of immediate euthanization threatens human or "public health" by supposedly interfering with the implementation of federal regulations requiring ante-mortem inspection of slaughterhouse animals. Petitioner's brief uses the phrase "human health," albeit for the first and last time, in a context that implies that Section 599f's alleged interference with ante-mortem inspection undermines the protection of human health. Petitioner's Brief at 14. Of course, that assertion is not accompanied by any citation to evidence in the record or scientific support. Petitioner also claims, somewhat more ambiguously, that any delay in the detection of vesicular diseases like foot-and-mouth disease ("FMD") "can be devastating." *Id.* at 13. But while Petitioner does not identify what kind of "devastation" it is referring to in this context, it is important to understand that it is decidedly not a human health issue. Indeed, Petitioner's supporting reference for its assertion is to an article, revealingly entitled, "Economic Impacts of Foreign

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animal otherwise destined for the slaughter line) undermines or threatens the humane handling purpose of the FMIA.

Animal Disease.” *Id.* (citing Philip L. Paarlberg, *et al.*, *Economic Impacts of Foreign Animal Disease*, USDA Economic Research Report Number 57 (May 2008), *available at* <http://www.ers.usda.gov/Publications/ERR57/ERR57.pdf>).

Although the joint brief of the three pork industry groups The National Pork Producers Council, The National Farmers Union, and the American Association of Swine Veterinarians (the “Industry *Amici*”) is far less ambiguous and far less restrained in its intimations about the supposed human health risks at issue, its assertions are equally unsupported. The Industry *Amici* work from the premise that “[a]nte-mortem inspection is particularly critical as a front-line defense against the spread of Classical Swine Fever (hog cholera) and Foot & Mouth Disease (a type of vesicular disease).” Brief of the Am. Ass’n. of Swine Veterinarians, *et al.* as *Amici Curiae* in Support of Pet’r and for Reversal of the Ninth Circuit’s Judgment at 7, *Nat’l Meat Ass’n. v. Harris*, No. 10-224 (9th Cir. Aug. 29, 2011) (“Industry *Amici* Brief”). Thus, preventing ante-mortem inspection by euthanizing a downed pig, the Industry *Amici* imply, will harm public health. For instance, the Industry *Amici* assert that the Ninth Circuit’s decision and Section 599f “endanger[] public health” (*Id.* at 3), “will have a potentially devastating impact on animal health and public health” (*Id.* at 6), “tie[] the hands of federal veterinarians...in fighting the spread of dangerous illnesses among swine (and potentially humans),” and “place[] the health of both swine and humans at unnecessary risk.” *Id.* at 12.

Notably, however, the Industry *Amici*, which include a trade association of pork industry veterinarians, fails to cite to literally anything, much less any science, to support any of its hyperbolic warnings about human health.

Even assuming that the federal regulations concerning ante-mortem inspection apply to animals euthanized and thus taken out of the food supply **before** they are offered for slaughter, the fact is that ante-mortem inspection of those downed animals suffering from FMD or hog cholera does **nothing** to protect or advance human health. Whatever the harms associated with those diseases, none include any threat to human health. Neither FMD nor hog cholera are zoonotic. In other words, these diseases cannot be transmitted to, or caught by, humans. Notwithstanding the absence of authority on the subject in the briefs of Petitioner and its *amici*, it is well recognized that FMD is not zoonotic. B.E. Straw *et al.*, *Diseases of Swine* 519 (9th ed. 2006) (“Diseases of Swine”) (“FMD viruses should not be considered zoonotic (citation omitted).”). The United States Department of Agriculture agrees that FMD poses no risk to human health. Animal and Plant Health Inspection Service, USDA, *Fact Sheet: Foot-and-Mouth Disease* (Feb. 2007), available at http://www.aphis.usda.gov/publications/animal_health/content/printable_version/fs_foot_mouth_disease07.pdf (“FMD is not recognized as a zoonotic disease.”). Similarly, hog cholera (also known as Classical Swine Fever or “CSF”) does not cause illness in humans. See e.g., APHIS, USDA, *Classical Swine Fever: Still a Threat* (Sept. 1999), available at: http://www.aphis.usda.gov/publications/animal_health/content/printable_version/fs_foot_mouth_disease07.pdf

[//www.aphis.usda.gov/publications/animal_health/content/printable_version/csfllead.pdf](http://www.aphis.usda.gov/publications/animal_health/content/printable_version/csfllead.pdf). (“CSF does not cause illness in people”).

Thus, notwithstanding their alarmist language, the exhortations of Petitioner and its *amici* that the Court must reverse the Ninth Circuit to avoid a potential public health catastrophe are entirely without basis and extremely misleading. There simply is no adverse public health issue implicated by Section 599f’s requirement of immediate euthanization and the consequent removal of downed pigs from the food supply.

In any event, even as a means for advancing the industry’s own (non-public health) objectives for seeking early detection of FMD and hog cholera, the claimed efficacy of ante-mortem inspection of non-ambulatory swine to detect these diseases is a medical *non sequitur*. In its brief in support of *certiorari*, the Industry *Amici* stated that information derived from ante-mortem inspection “can only be determined by viewing the animal **in motion** during the ante-mortem inspection.” Motion for Leave to File Brief as *Amici Curiae* and Brief of the American Association of Swine Veterinarians and the National Pork Producers Council as *Amici Curiae* in Support of Petition for Writ of Certiorari at 6, *Nat’l Meat Ass’n. v. Brown*, No. 10-224 (9th Cir. Sept. 10, 2010) (“Industry Brief (Cert.)”). In belated recognition of the implausibility of arguing that a non-ambulatory animal can be observed in motion, the Industry *Amici* have amended that sentence in their brief on the merits to state that such

information “can be determined only by viewing the animal while it is **still alive**.” Industry *Amici* Brief at 8. But simply changing the words “in motion” to “while it is still alive” does not remedy the illogic of the position. Rather than cite any scientific or other evidence for this new position, the Industry *Amici* simply drop a footnote with the *ipse dixit* assertion that downed pigs can demonstrate sufficient “motion” for ante-mortem inspection while lying down. *Id.* at 8, n. 3. But even the FSIS Manual relied upon by the Industry *Amici* (which focuses on the observation of “lameness or limping”, “stiffness”, “stagger[ing] or circl[ing]”, “run[ning] into things”, “abnormal gaits”, and “abnormal positions”) belies the notion that any meaningful diagnostic information can be gleaned from observing a pig that is lying down.

Moreover, even as to ambulatory swine, there would be little to be gained from a diagnostic perspective by observing pigs walk which have either hog cholera or FMD. The clinical signs of hog cholera are non-specific and only post-mortem lesions and virus identification are diagnostic. *Diseases of Swine* at 316 (“Because there are no pathognomonic clinical signs in CSF, laboratory diagnosis is always required for confirmation.”). As for FMD, the necessary diagnostic identification of often small blisters between the hooves of the infected animal, which remain visible for many hours after death, is far easier post-mortem. In any event, a laboratory analysis of samples is also necessary to confirm a FMD diagnosis. *Diseases of Swine* at 523.

C. Protecting The Profitability of Slaughterhouse Operations, As Opposed to Public Health, Does Not Justify Preemption of Section 599f

Petitioner ultimately admits its real concern with Section 599f is economics, not public welfare. Petitioner's Brief at 50 ("California's ban on sales was expressly intended to regulate slaughterhouse operations through economic pressure."). The Industry *Amici*, while cloaking themselves first and foremost as protectors of the public from a non-existent health risk, are far less shy about the real ax they have brought to grind. They devote the entire last section of their brief to industry harm, arguing that the "immediate euthanization mandate requires the pork industry to needlessly cull healthy animals from the herd" (Industry *Amici* Brief at 18), and thus: "[t]he California law threatens to make raising pigs economically unviable." *Id.* at 20.

Notwithstanding the concern of Petitioner and its industry allies with the profitability of the meat business, Section 599f's alleged interference with that economic interest has no place in this Court's decision whether Congress ever intended that the FMIA preempt it. The question is whether Section 599f interferes with the specific federal interest actually advanced by the statute. After all, the Court's "task is 'to determine whether under the circumstances of this particular case, (the State's) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hines v. Davidowitz*, 312 U.S. 52, 67, 61

S. Ct. 399, 404, 85 L.Ed. 581 (1941).” *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). As shown above, Section 599f simply has no adverse effect on the public health and welfare interests that the FMIA was enacted to protect

Rather than interfere with the actual purpose of the FMIA, Section 599f simply constitutes an exercise of a State’s traditional police power to establish minimal standards for appropriate treatment of animals based on a moral and ethical concerns. *See e.g., C.E. Am., Inc. v. Antinori*, 210 So. 2d 443, 444 (Fla. 1968) (“[I]t is now generally recognized that legislation which has for its purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power.” (citing 4 Am.Jur.2d Animals, Sec. 27)); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.” (citations omitted)); *see also, United States v. Stevens*, 130 S.Ct. 1577, 1583 (2010) (all 50 states and the District of Columbia have enacted animal cruelty laws); *United States v. Lopez*, 514 U.S. 549, 585 (1994) (Thomas, J., concurring) (noting that regulation of animal cruelty properly left to the individual States).

Given the well established cornerstones of the Court’s pre-emption jurisprudence, there is no basis for upsetting California’s exercise of its traditional police powers as manifested by Section 599f unless that statute intrudes upon the purpose of the federal

act at issue. *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1194-95 (2009) (“the purpose of Congress is the ultimate touchstone in every pre-emption case” (citations omitted) and “we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” [citations omitted]).

Thus, in *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litigation*, 621 F.3d 781 (8th Cir. 2010), the Court of Appeals remarked that prosecution for abuse of a farmer’s livestock under a state anti-cruelty statute would not be preempted by the Organic Foods Production Act of 1990 (the “OFPA”). The OFPA had established national standards for the sale and labeling of organically produced agricultural products, and created a certification program through which agricultural producers may become certified to produce organic products. *Id.* at 787. As the Eighth Circuit properly reasoned, “[p]reempting state law claims unrelated to the decision to certify, and certification compliance, does not advance the purpose of establishing national standards for organic foods.” *Id.* at 798. The same reasoning applies here. Preempting a state law that necessarily removes non-ambulatory swine from the food supply by requiring their immediate euthanization for humanitarian reasons does nothing to advance (or undermine) the purpose of insuring wholesome and clean meat in the United States.

Because it is undisputed that Congress’ purpose in enacting the FMIA was to protect the

health and welfare of the consuming public and because Section 599f's immediate euthanization requirement does not threaten public health or welfare in the slightest, a finding of pre-emption in this case could not be properly based on any claim that such a finding is necessary to implement the intention of Congress.

IV. EUTHANIZING DOWNED PIGS BEFORE THEY ARE OFFERED FOR SLAUGHTER ENCOURAGES MORE HUMANE TREATMENT OF THOSE ANIMALS DELIVERED TO CALIFORNIA SLAUGHTERHOUSES

The loss of pigs during transport to slaughterhouses has been a long standing and worsening problem in the swine industry. In 1933, as reported by the National Livestock Loss Prevention Board, which was developed to monitor such losses, .08% of pigs delivered to processing plants died during transport. M.J. Ritter, *et al.*, *Review: Transport Losses in Market Weight Pigs: I. A Review of Definitions, Incidence, and Economic Impact*, 25 THE PROF. ANIMAL SCIENTIST 404, 405 (2009). In 2006, that percentage had almost tripled to .22%, which translates to 228,114 pigs given the number of pigs slaughtered that year. A similar problem in pigs becoming non-ambulatory during transport to slaughter has existed and also worsened over the same time frame. In 1933, the reported figure was .16%, and by 2006, that figure had grown to .44% which, in that year, represented 456,228 pigs. There is no dispute about this phenomenon. Petitioner itself

acknowledges that “hogs can become nonambulatory during transit.” Petitioner’s Brief at 46.

The causes of this problem have been the subject of extensive industry study and have led to a number of recommendations for decreasing the levels of death and fatigue or injury associated with a non-ambulatory condition. M.J. Ritter, *et al.*, *Effect of Floor Space During Transport of Market-Weight Pigs on the Incidence of Transport Losses at the Packing Plant and The Relationship Between Transport Conditions and Losses*, 84 J. ANIMAL SCI. 2856, 2856-2864 (2006) (“Ritter”); John McGlone, *Fatigued Pigs: The Transportation Link*, PORK MAG., February 1, 2006 (“McGlone”); Charles Haley, *et al.*, *Association Between In-Transit Loss, Internal Trailer Temperature and Distance Traveled by Ontario Market Hogs*, 72 THE CAN. J. OF VETERINARY RES. 385, 385-389 (2008) (“Haley”). Recommendations designed to lower stress levels and minimize other injurious conditions experienced during transport include: use of monitoring and cooling systems to lower internal trailer temperatures (Haley, *supra* at 387), avoiding unnecessary stops and keeping transport trucks moving or using fans (McGlone, *supra*), using proper bedding to prevent slipping and falling and to provide comfort in cold weather (McGlone, *supra*), and decreasing overcrowding on trucks (Ritter, *supra* at 2864).

Thus, the industry itself has established a correlation between providing humane treatment for pigs during transport and reducing the number of non-ambulatory pigs delivered to a slaughterhouse.

Section 599f's requirement of immediate euthanasia in advance of slaughter, eliminating all downed swine from the food supply and any economic benefit that might be derived from them, thus encourages the types of humane treatment recognized by the industry as effective in preventing pigs from experiencing the pain and suffering associated with becoming non-ambulatory in the first place. There is nothing in the purposes underlying the FMIA that would suggest any Congressional intent to preempt such a legislative initiative from a state.

V. CONCLUSION

Dr. Blackwell and Dr. Mozzachio respectfully submit that the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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