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

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NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, In Her Official Capacity as Attorney
General of California; EDMUND G. BROWN JR.,
In His Official Capacity as Governor of California;
STATE OF CALIFORNIA; THE HUMANE SOCIETY
OF THE UNITED STATES; FARM SANCTUARY, INC.;
HUMANE FARMING ASSOCIATION;
ANIMAL LEGAL DEFENSE FUND,

Respondents.

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

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BRIEF FOR THE STATE RESPONDENTS

—◆—
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QUESTION PRESENTED

Whether California's prohibition against slaughterhouses, stockyards, auctions, market agencies and dealers buying, selling, receiving, processing, or butchering nonambulatory swine for human consumption is preempted by the Federal Meat Inspection Act, which regulates certain aspects of the meat inspection process.

LIST OF PARTIES

Petitioner who was the plaintiff/appellee below is accurately listed in Petitioner's brief. Due to changes in state officers and pursuant to Rule 35.3 of the Supreme Court Rules, respondents for the state who were defendants/appellants below, are now Attorney General of California Kamala D. Harris (formerly Edmund G. Brown Jr.) and Governor of California Edmund G. Brown Jr. (formerly Arnold Schwarzenegger). The Humane Society of the United States; Farm Sanctuary, Inc.; Humane Farming Association; and Animal Legal Defense Fund intervened as defendants and are respondents in this Court. The American Meat Institute intervened as a plaintiff in the trial court, but was not a party to the appeal to the Ninth Circuit, and is not a party in this Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF AUTHORITIES.....	iv
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT.....	5
SUMMARY OF ARGUMENT	14
ARGUMENT.....	16
THE FMIA DOES NOT EXPRESSLY PREEMPT SECTION 599f	16
A. Section 599f’s Provisions Dealing With The “Receipt And Slaughter” Of Non-ambulatory Swine Are Not Expressly Preempted Because Those Animals Never Enter The Food-Production Process.....	23
B. The Humane Treatment Provision Of Section 599f Is Not A Requirement Of The “Operations” Of A Slaughterhouse Preempted By The FMIA, And Is Consistent With That Act	29
CONCLUSION.....	33

TABLE OF AUTHORITIES

	Page
CASES	
<i>Altria Group v. Good</i> , 555 U.S. 70 (2008).....	17, 18, 29
<i>Bates v. Dow Agrosociences LLC</i> , 544 U.S. 431 (2005).....	18
<i>California v. ARC America Corp.</i> , 490 U.S. 93 (1989).....	18
<i>Cavel Int’l, Inc. v. Madigan</i> , 500 F.3d 551 (7th Cir. 2007).....	19
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504 (1992).....	17
<i>Empacadora de Carnes de Fresnillo v. Curry</i> , 476 F.3d 326 (5th Cir. 2007)	19
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	17
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528 (1985)	17
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> , 471 U.S. 707 (1985).....	17
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977).....	19
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981).....	17, 18, 28
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996).....	18
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992).....	20
<i>Retail Clerks Int’l Ass’n v. Schermerhorn</i> , 375 U.S. 96 (1963).....	18

TABLE OF AUTHORITIES – Continued

	Page
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947).....	18
<i>United States v. Stevens</i> , ___ U.S. ___, 130 S.Ct. 1577 (2010).....	29
<i>Wyeth v. Levine</i> , 555 U.S. 555, 129 S.Ct. 1187 (2009).....	18

CONSTITUTIONAL PROVISIONS

U.S. Const., Article VI, cl. 2	1, 17
--------------------------------------	-------

FEDERAL STATUTES

21 U.S.C. § 601	3, 8
21 U.S.C. § 602	<i>passim</i>
21 U.S.C. § 603	<i>passim</i>
21 U.S.C. § 642	3
21 U.S.C. § 678	<i>passim</i>

STATE STATUTES

Cal. Food & Agric. Code §§ 9101-9501.....	27
Cal. Food & Agric. Code §§ 9801-10610.....	26
Cal. Food & Agric. Code §§ 10781-10786.....	26
Cal. Penal Code § 598a.....	21
Cal. Penal Code § 598b.....	21
Cal. Penal Code § 598c	21
Cal. Penal Code § 598d.....	21

TABLE OF AUTHORITIES – Continued

	Page
Cal. Penal Code § 599f.....	<i>passim</i>
Cal. Penal Code § 599f(a).....	11, 14, 16, 23
Cal. Penal Code § 599f(b).....	11, 14, 16, 23
Cal. Penal Code § 599f(c).....	11, 14, 15, 16, 30
Cal. Penal Code § 599f(e).....	13
Cal. Penal Code § 599f(i).....	25

FEDERAL REGULATIONS

9 C.F.R. § 300.2.....	8
9 C.F.R. § 301.2.....	8
9 C.F.R. § 309.2.....	8, 10
9 C.F.R. § 309.2(b).....	10, 24, 25
9 C.F.R. § 309.3.....	10
9 C.F.R. §§ 309.3(a)-(c).....	24
9 C.F.R. § 309.3(c).....	31
9 C.F.R §§ 309.4-309.18.....	10
9 C.F.R. § 309.13.....	24
9 C.F.R. § 309.13(a).....	24, 30
9 C.F.R. § 311.1.....	24
9 C.F.R. § 313.1(c).....	30
9 C.F.R. § 313.2(d)(1).....	30

TABLE OF AUTHORITIES – Continued

	Page
OTHER AUTHORITIES	
74 Fed. Reg. 11463 (March 18, 2009).....	31
Senate Committee on Agriculture and Forestry, Wholesome Meat Act of 1967, S. Rep. No. 90- 799 (1967) as reprinted in 1967 U.S.C.C.A.N.....	22
Laurence H. Tribe, AMERICAN CONSTITU- TIONAL LAW (3d ed. 2000).....	17
Food Safety and Inspection Service Directive 6100.1, Rev. 1 (April 16, 2009).....	8, 27

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Supremacy Clause of the United States Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

As amended, California Penal Code section 599f (Section 599f) provides:

§ 599f. Purchase or sale of nonambulatory animal by slaughterhouse, stockyard, auction or market agency

(a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.

(b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.

(c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.

- (d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.
- (e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.
- (f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.
- (g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.
- (h) A violation of this section is subject to imprisonment in the county jail for a period not to exceed one year, or by a fine of not more than twenty thousand dollars (\$20,000), or by both that fine and imprisonment.
- (i) As used in this section, “nonambulatory” means unable to stand and walk without assistance.
- (j) As used in this section, “animal” means live cattle, swine, sheep, or goats.

(k) As used in this section, “humanely euthanized” means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.

The Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 601 *et seq.*, states in pertinent part:

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter [21 USCS §§ 601 *et seq.*], which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose record keeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State. . . . with respect to articles prepared at any establishment under inspection with the requirements under subchapter I of this chapter. . . . This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this Act.

21 U.S.C. § 678 (West 1999).

The Congressional Statement of Findings for the Federal Meat Inspection Act provides:

It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. . . . regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

21 U.S.C. § 602.

Additionally, the purpose of the Federal Meat Inspection Act is described as follows:

For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce; and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other amenable species, and when so

slaughtered the carcasses of said amenable species shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary. . . .

21 U.S.C. § 603.

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STATEMENT

1. In January 2008, the Humane Society of the United States released an undercover video of a California slaughterhouse; the video depicted images of sick and disabled cows (“downer” or “non-ambulatory” animals) being dragged by forklifts, kicked and electro-shocked on their way to being slaughtered. Petition for Certiorari Appendix (Pet. App.) A at 4a; also Joint Appendix (JA) at 57-58 (Bill Analysis including author Assembly member Paul Krekorian’s statement in favor of Assembly Bill 2098). Upon further investigation, it was discovered that the meat from these cows had been processed and had entered the food supply. JA at 58. After the video’s release, the largest beef product recall in the history of the United States was ordered to address the “risks posed by this meat that has been deemed by the USDA as unfit for consumption.” *Id.*

In 2008, following the beef product recall, the California Legislature amended existing California law governing slaughterhouses, to prevent similar events in the future. Specifically, Assembly Bill 2098

prohibited purchasing, selling, receiving, processing, or butchering “nonambulatory” or “downer” pigs, sheep, goats and cattle. The law required that stockyards, auctions, market agencies, dealers, and slaughterhouses must take action to immediately euthanize nonambulatory animals.

The bill’s author noted that “Public health professionals have long warned that meat derived from downed animals has a much increased susceptibility to passing on the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death.” JA at 58. As the Ninth Circuit later noted, “downer” cows are more likely to be diseased, “partly because animals can become nonambulatory due to disease and partly because downer animals grow sicker as they end up rolling around in other animals’ refuse.” Pet. App. At 4a. One hundred forty-three million pounds of beef had been processed and sold by the California plant that triggered the recall, and 37 million pounds of that beef had been distributed to school lunch programs. JA at 58. Assembly Bill 2098 amended the California Penal Code by prohibiting the purchase, slaughter, and sale of nonambulatory animals for consumption and provided that a violation of these prohibitions would be punishable by imprisonment for up to a year and a fine of no more than \$20,000. *Id.*; see also Cal. Penal Code § 599f (2009).

The purpose of Assembly Bill 2098 was to better protect human health and to prevent the inhumane treatment of downed animals. JA at 32-33, 55-62,

68-69. The legislation was supported by the United States Humane Society, the California District Attorneys Association, and the California Cattleman's Association, and there was no registered opposition. *Id.* at 62, 74. Petitioner did not oppose the statute. *Id.* The bill was signed into law on July 22, 2008 and became effective January 1, 2009.

The Federal Meat Inspection Act (FMIA) was enacted by Congress to protect the health and welfare of consumers by assuring that meat and meat food products are wholesome and not adulterated. 21 U.S.C. § 602. The FMIA sets forth inspection and examination requirements for animals that will be slaughtered for human consumption. 21 U.S.C. §§ 602-603. Congress expressed its intent to preempt a narrow category of state actions that seek to regulate the premises, facilities and operations of slaughterhouses:

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State. . . .

21 U.S.C. § 678. Congress' intent that this language be applied narrowly is confirmed by "savings clause" language which provides that states regulate "other matters" so long as the requirements are "consistent with this chapter." *Id.*

The FMIA is administered by the United States Department of Agriculture (USDA) through the Food Safety and Inspection Services (FSIS). 21 U.S.C. §§ 601, 603; 9 C.F.R. 300.2. Under the FMIA, federal personnel conduct an “ante-mortem inspection” of the animals before they are slaughtered for human consumption. 21 U.S.C. § 603(a). If “offered for slaughter,” an animal may be (1) passed for slaughter, (2) identified as “suspect” or (3) condemned. 9 C.F.R. §§ 301.2, 309.2. If an establishment does not present animals for ante-mortem inspection, for whatever reason, the federal inspectors on post-mortem inspection “are not able to determine that carcasses are not adulterated and, therefore, cannot permit the carcasses to be marked as ‘inspected and passed.’” FSIS Directive 6100.1, Revision 1 (Apr. 16, 2009) at V, 2.

2. On December 23, 2008, petitioner filed a complaint for declaratory and injunctive relief seeking to establish that (1) Section 599f, as it applies to swine and the processing of pork, is preempted by the FMIA; (2) Section 599f is unconstitutional because it violates the Commerce Clause of the U.S. Constitution; and (3) Section 599f is void for vagueness under the Fourteenth Amendment. JA at 1. At the same time, petitioner filed a motion for a preliminary injunction, and on December 30, 2008, petitioner amended the motion for a preliminary injunction. JA

at 1-2.¹ State Respondents opposed the entirety of petitioner’s motion.² JA at 3.

On February 19, 2009, the trial court granted petitioner’s motion for a preliminary injunction, finding that the FMIA preempted Section 599f, both expressly and by implication. Pet. App. B at 18a-53a. The trial court recognized that the public interest advanced by the challenged law – protecting the quality and quantity of meat entering the food supply – was “significant.” JA at 49-50. “California’s interest is in ensuring that the meat supply is not tainted by diseased or potentially diseased animals. . . . [D]owned animals have been shown to have increased risk of carrying disease. California has a significant interest in ensuring the health of its citizens from properly handled and slaughtered animals.” Pet. App. at 49a-50a. Nonetheless, the court determined that the risk of harm is minimized by the FMIA. *Id.* The court also determined that although it did not have before it evidence to determine whether the reduction in the quantity of meat in and of itself was significant, “the evidence establishes that some reduction in the food supply will occur. . . . Reducing the quantity

¹ American Meat Institute successfully intervened as a plaintiff, but did not join in or file a motion for preliminary injunction and is not a party to this appeal.

² The Humane Society of the United States; Farm Sanctuary, Inc.; Humane Farming Association; and the Animal Legal Defense Fund successfully intervened as defendants. They opposed the preliminary injunction motion as well. JA at 2-3.

of the food supply is a substantial factor warranting enjoining enforcement of Section 599f.” Pet. App. at 50a-51a. The court recognized that the inhumane treatment of animals is a significant risk, but determined that the FMIA provides for the humane treatment of animals. JA 51a-52a.

3. The Ninth Circuit reversed the trial court and found that there was no likelihood that petitioner would succeed on its express preemption claim. Pet. App. A at 9a, 17a. As recited by the court, regulations pursuant to the FMIA require nonambulatory animals to be classified as “U.S. Suspect” and held for further examination. *Id.* at 8a; *see also* 9 C.F.R. § 309.2(b). If the downer animal shows signs of certain diseases, it must be classified as “U.S. Condemned,” and disposed of according to specific procedures. *Id.*; *see also* §§ 309.3, 309.4-309.18. But, if the animal passes all required inspection, the federal regulations do not prohibit the slaughter and sale of nonambulatory animals for human consumption. *Id.*; *see also* § 309.2.

The Court of Appeals noted that the FMIA contains an express preemption provision (21 U.S.C. § 678),³ but that provision “explicitly preserves for the

³ “Requirements within the scope of this chapter with respect to *premises, facilities and operations* of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State. . . .” 21 U.S.C. § 678 (emphasis added).

states broad authority to regulate slaughterhouses: ‘This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.’ 21 U.S.C. § 678.” Pet. App. at 8a-9a.

The Ninth Circuit found that there was no express preemption because while section 678 of the FMIA preempts state regulation of the “premises, facilities and operations” of slaughterhouses, Section 599f(a)-(c) does not address these categories, but instead regulates the kind of animal that may be slaughtered. *Id.* at 9a.

The Ninth Circuit found that “California’s prohibition of the slaughter of nonambulatory animals does not duplicate federal procedures; it withdraws from slaughter animals that are unable to walk to their death. This prohibition doesn’t require *any* additional or different inspections than does the FMIA, and is thus not a regulation of the ‘premises, facilities and operations’ of slaughterhouses. There is no express preemption here.” Pet. App. at 11a.

Additionally, the Ninth Circuit determined that petitioner would likely not succeed on its claim that section 599f’s ban on the receipt and slaughter of nonambulatory animals was preempted by implication. Pet. App. at 11a. Critical to the court’s analysis was the statement in section 678 that “[t]his chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with

this chapter, with respect to any other matters regulated under this chapter.” *Id.* at 12a. The court found that this language “shows that Congress did not intend to occupy the field of slaughterhouse regulation, so only conflict preemption is at issue.” *Id.*

The court found that it was physically possible to comply with both Section 599f and the FMIA. *Id.* FMIA inspection requirements apply to animals that will be slaughtered for human consumption, but nothing in the FMIA requires the slaughter of downer animals for human consumption. *Id.* “Federal regulations require inspection *if* downer animals are to be slaughtered.” *Id.* Accordingly, the court found that Section 599f was not an obstacle to accomplishing the purposes of the FMIA. The purpose of the FMIA, as noted by the court, is to protect the health and welfare of consumers “by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.” *Id.* (quoting 21 U.S.C. § 602). The purpose of the FMIA “is not to preserve the slaughter of any kind of animal for human consumption.” *Id.* at 13a-14a. Nor did Congress establish an unlimited choice of what kinds of animals to slaughter for individual slaughterhouses. *Id.* at 14a.

The court determined that nothing in Section 599f serves as an obstacle to the FMIA. *Id.* Nothing in the record suggests that the requirements of Section 599f “were so onerous and confusing that it put slaughterhouse compliance with federal inspection standards

at risk.” *Id.* The court rejected petitioner’s argument that Section 599f “will prevent the examination of downer animals for disease, hindering federal procedures designed to identify and stem the spread of disease” because nothing in the record substantiated this concern. *Id.* at 15a n.7.

The court did find that one provision, Section 599f(e) was likely preempted because it prohibits conduct – dragging unconscious downer animals – that federal law does not. *Id.* at 15a. Additionally, the FMIA deems more equipment suitable for moving downer animals – such as electric prods – than does Section 599f(e). However, at the preliminary injunction stage “[Petitioner] NMA failed to offer any evidence on [the issue of irreparable injury]” with respect to Section 599f(e) and did not show that the balance of equities and the public interest tipped in its favor as to this provision. Pet. App. 17a.

The court vacated the district court’s injunction with the instruction that its decision did not preclude the entry of a preliminary injunction as to Section 599f(e) after appropriate findings or a preliminary injunction based on petitioner’s vagueness and dormant Commerce Clause arguments. Pet. App. at 6a n.2, 17a.



SUMMARY OF ARGUMENT

The FMIA does not expressly or impliedly preempt⁴ Section 599f. To the contrary, Congress has expressly invited state regulation in this area on “other matters” that are consistent with federal law. 21 U.S.C. § 678. The challenge to Section 599f is very narrow – petitioner challenges the portions of Section 599f applicable only to federal slaughterhouses, and not the provisions applicable to stockyards, auctions, market agencies, or dealers or the purchase and sale of animals not on slaughterhouse premises. Only the slaughterhouse provisions of Section 599f(a), (b), and (c) are at issue.

Petitioner’s argument that Section 599f is a “requirement” with respect to slaughterhouse “operations” that are “within the scope [of the FMIA] blurs the distinction between “operations” and “other matters.” The definition of “operations” used by petitioner is so broad that it would encompass every activity on the slaughterhouse floor – whether or not the activity is related to the FMIA purview of inspection and examination of animals for human consumption.

⁴ Petitioner presents only an express preemption argument and waives any implied preemption argument (Pet. Br. at 20 n.10), but the United States amicus brief argues that even if the sale ban in Section 599(f)(b) is not expressly preempted, it would be preempted under conflict preemption principles. Brief of the United States as Amicus Curiae Supporting Petitioner (Br. of the United States) at 21 n.5.

Section 599f specifies that certain types of animals, nonambulatory ones, must not be included in the food supply. The FMIA does not require that nonambulatory animals must become part of the meat inspection process. Congress has not mandated that certain types of animals must be slaughtered for human consumption. To the contrary, Congress has simply provided procedures that must be followed when an animal is slaughtered for human consumption. California's prohibition on processing non-ambulatory swine for human consumption does not conflict with Congress' regulation of how animals destined for human consumption must be processed.

Construing "operations" to only encompass those activities related to the processing of meat that has not been prohibited for human consumption is consistent with the Congressional purpose behind the FMIA to regulate the quality and wholesomeness of meat.

Finally, the humane treatment provision of Section 599f(c) can be read consistently with the FMIA. In some cases e.g., some animals marked as "U.S. Condemned," federal law also requires that the animal must be humanely euthanized. In other cases, with respect to animals marked as "U.S. Suspect," the California law may be read consistently with the federal law to provide certain provisions of shelter and food while the animal awaits humane euthanization. Accordingly, the state law requirements should not be

read to be “in addition to” or “different than” those made under the FMIA itself.

◆

ARGUMENT

THE FMIA DOES NOT EXPRESSLY PREEMPT SECTION 599f

Petitioner has seemingly abandoned the argument that Section 599f frustrates or conflicts with the FMIA and is therefore *impliedly* preempted. Pet. Br. at 20 n.10. Petitioner now argues only that Section 599f is *expressly* preempted by the terms of 21 U.S.C. § 678. Specifically, petitioner argues that any “‘requirements’ in Section 599f ‘with respect to’ slaughterhouse ‘operations’ that are ‘within the scope of [the FMIA]’ but that are ‘in addition to, or different than’ FMIA requirements” are preempted by the FMIA. Pet. Br. at 29.

Even when, as here, Congress has expressed its intent to preempt state law, the question of the scope of that preemption remains. Specifically, the question here is whether the challenged prohibitions of Section 599f⁵ impose requirements on the “operations” of

⁵ Petitioner limits its argument to federal slaughterhouses and what transpires within the federal slaughterhouse. Essentially, petitioner challenges only the prohibitions against slaughterhouses in Section 599f(a), (b), and (c). The United States and petitioner seem to concede that Section 599f does not preempt state regulation of what a slaughterhouse purchases if it takes

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slaughterhouses that are subject to federal regulation under the FMIA.⁶ *Cf. Altria Group v. Good*, 555 U.S. 70 (2008) (state cause of action for fraudulent advertising of cigarettes was not a lawsuit “based on smoking or health” within the meaning of express preemption provision). If they do not, then the state regulation is “saved” from preemption by operation of language within 21 U.S.C. § 678 itself.

There is, of course, a strong presumption against federal preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.”); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).⁷

place off the premises of the slaughterhouse. Pet. Br. 46 n.18; U.S. Br. 23 n.7.

⁶ Petitioners concede that the “marking, labeling, packaging and ingredient requirements” are not at issue here. Pet. Br. at 29.

⁷ Professor Tribe observes that the presumption against preemption “further[s] the spirit of *Garcia* [*v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)] by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . . [T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states’ interests.” Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 6-28, at 1175-76 (3d ed. 2000), quoted in part in *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

This is particularly true where the state law concerns traditional areas that come within the police power, such as health and safety laws. *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187, 1194-1195 (2009) (“In all pre-emption cases and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the assumption that the historic 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); see also *Altria Group, Inc. v. Good*, 555 U.S. 70, 77, 129 S. Ct. 538, 543-544 (2008); *Maryland v. Louisiana*, 451 U.S. at 746; *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (preemption analysis “starts with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress.”) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Only if Congress intended to preempt state law will compliance with state law be excused. See *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963) (“The purpose of Congress is the ultimate touchstone.”).

“[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption.’” *Altria Group, Inc.*, 555 U.S. at 77 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (rejecting the contention that the

presumption “should apply only to the question whether Congress intended any preemption at all,” and not to “the scope of its intended invalidation of state law”).

Section 599f is a disqualification of animals that may not, under any circumstances, be slaughtered in California *for purposes of human food production*. In its effect, the statute’s preclusive disqualification of “downer” animals is analogous to a State’s disqualification of the use of dogs, cats, pets or horses for human consumption. *See, e.g., Cavel Int’l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007) (state ban on horse slaughter not preempted); *Empacadora de Carnes de Fresno v. Curry*, 476 F.3d 326 (5th Cir. 2007) (same); *see also supra* note 10. In neither case do the disqualified animals become part of the slaughterhouse “operations” that result in the production of human food.⁸

⁸ Thus, this Court’s decision in *Jones v. Rath Packing Co.*, 430 U.S. 519, though involving FMIA preemption of state law, is not dispositive here. In *Rath Packing*, the Court’s task – consistent with the presumption against preemption – was “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.” *Id.* at 526 (citations omitted). The Court found that California’s methodology for measuring bacon weight was inconsistent with federal methodology and, accordingly, the state law was deemed to be preempted by the express language of the FMIA. Here, as will become evident, Section 599f is *complementary* to, and in no way, poses an obstacle to accomplishment of congressional purposes.

Section 678 includes a savings clause: “This chapter shall not preclude any State . . . from making requirement [sic] or taking other action, consistent with this chapter, with respect to any other matters regulated under this Act.” 21 U.S.C. § 678. Slaughterhouse “operations” – in the broadest possible sense of that word – may implicate many areas of legitimate state concern, such as animal cruelty or occupational safety. Petitioner’s claim of express preemption would read the FMIA as preempting state regulation from any of those areas – whether or not preemption furthers the purposes of, or obstructs accomplishment of the FMIA goal of ensuring that only quality meat enters the human food supply.⁹

The term “operations” must be read in light of Congress’ manifest intent to preserve state regulation of “other matters” so long as that regulation is “consistent with” the FMIA. State disqualification of ill

⁹ Petitioner’s reliance on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) is, accordingly, unavailing. The cited reference concerns the unremarkable canon of construction that the specific will govern over the general. The question in this case is not whether Congress intended to preempt state regulation of slaughterhouse “operations,” but rather the *scope* of the phrase “operations.” California here contends that “operations” means only the operations that are reasonably of federal concern, and that Congress did not intend to oust States from the prerogative of disqualifying *kinds* of animals – in this case ill and suffering animals – from ever entering into “operations” of federal concern.

and suffering animals (or, indeed, horses or pets)¹⁰ from entering the human food supply – even when the disqualification of those animals is implemented within the four walls of a slaughterhouse – gives the saving clause its full effect, while still preserving federal regulation of “operations” that implicate federal interests.

Petitioner argues that a broad interpretation must be given to both the express preemption provision in FMIA, and the definition of “operations” because “Congress was declaring it wanted uniform and comprehensive federal regulation of slaughterhouse operations.” Pet. Br. at 38-39, 43-44; Veterinarian’s Br. at 7. But the Congressional intent that there be comprehensive regulation of slaughterhouse operations does not support petitioner’s argument that “operations” include every action on the slaughterhouse floor. Even, petitioner concedes that laws regarding building codes, workplace safety and general criminal laws are outside the scope of the FMIA, Pet. Br. at 58 n.20, although these laws

¹⁰ California prohibits the killing of dogs or cats with the intent to sell or give away the pelt of such animal (or to sell, buy, give away, or accept any pelt of a dog or cat). Cal. Penal Code § 598a. California prohibits the use of an animal commonly kept as a pet or companion, or any horse, burro, pony, or mule from being used as human food. Cal. Penal Code § 598b (pet prohibition with exceptions noted for livestock, poultry, fish, or other agricultural commodities), § 598c (prohibiting horse slaughter for human consumption), § 598d (prohibiting the sale of horse-meat for human consumption).

incidentally involve “operations.” Similarly, animal cruelty laws and a state law disqualifying “types” of animals from the human food supply may reasonably be considered outside the scope of the FMIA despite their incidental relation to plant “operations.”

Petitioner misapprehends congressional purpose behind the FMIA. Congress was not intent on ensuring that *any* particular type of meat will actually enter the human food supply, only that meat which does enter the human food supply is safe for human consumption. The purpose of the FMIA was to “assure[] that meat and meat food products distributed to [consumers] are wholesome, not adulterated, and properly marked, labeled, and packaged.” 21 U.S.C. § 602; *see also* Senate Committee on Agriculture and Forestry, Wholesome Meat Act of 1967, S. Rep. No. 90-799, at 3, 19-21 (1967) as reprinted in 1967 U.S.C.C.A.N. (recommending an amendment that would limit the traffic in unfit meat and meat products); 21 U.S.C. § 603 (the purpose of the FMIA is to prevent the “use in commerce of meat and meat food products which are adulterated”). Accomplishment of Congress’ purpose, therefore, means that “operations” within the contemplation of the FMIA encompasses any slaughterhouse processing of animals that may reasonably become part of the human food supply. Accordingly, animals that are *categorically disqualified* by state law from ever becoming part of the human food supply never enter the “operations” of a slaughterhouse for purposes of federal regulation.

Section 599f does nothing more than categorically exclude from the food production process certain suffering animals – downer animals – in furtherance of state health, safety, and animal welfare interests. When state law is complied with, downer animals in California – like horses in other states – never become part of the slaughterhouse “operations.”

A. Section 599f’s Provisions Dealing With The “Receipt And Slaughter” Of Nonambulatory Swine Are Not Expressly Preempted Because Those Animals Never Enter The Food-Production Process.

Section 599f(a) prohibits a “slaughterhouse, stockyard, auction, market agency or dealer” from buying, selling, or receiving nonambulatory animals for human consumption. Cal. Penal Code § 599f(a). Additionally, the statute states that no slaughterhouse “shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.” Cal. Penal Code § 599f(b). The “receipt and slaughter” prohibitions of Section 599f¹¹ do not deal with the “operations” of the federal slaughterhouse because the provisions are concerned with animals that will in no event become meat or meat food products.

Nothing in the FMIA or related regulations expressly requires that nonambulatory animals be

¹¹ The phrase was used by the Ninth Circuit. Pet. App. at 5a.

processed, slaughtered, and sold for “meat and meat food products” in the normal course of business. The FMIA’s focus is on protecting the food supply. 21 U.S.C. §§ 602-603. As discussed below, Petitioner’s own references to federal regulations confirm that the Section 599f prohibitions fall outside the scope of the “operations” of a federal slaughterhouse.

1. Federal regulations contemplate that non-ambulatory animals will be disposed of in some instances and will not enter the slaughtering and inspection process for production of human food. For example, federal law specifies that animals that are “dead or dying,” comatose, or showing signs of specific diseases must be classified as “U.S. Condemned” and disposed of. *See* 9 C.F.R. §§ 309.3(a)-(c), 309.13 Animals so classified “shall be killed by the official establishment, if not already dead. *Such animals shall not be taken into the official establishment to be slaughtered or dressed*; nor shall they be conveyed into any department of the establishment used for edible products. . . .” 9 C.F.R. § 309.13(a) (emphasis added; exceptions noted for some diseases). Certain “U.S. Condemned” animals, therefore, like California’s “nonambulatory” animals, never enter in the inspection and production “operations” of a slaughterhouse.

Granted, not all nonambulatory animals are necessarily classified as “U.S. Condemned”; some may be classified as “U.S. Suspect.” *See* 9 C.F.R. §§ 309.2(b) (“all seriously crippled animals and non-ambulatory animals shall be identified as “U.S. Suspects” and disposed of as provided in § 311.1 of

this subchapter”).¹² No federal regulation requires that nonambulatory animals will be processed for human food. Thus, California’s categorical exclusion of nonambulatory animals poses no impediment to effectuation of congressional purpose, because federal law does not require that “U.S. Condemned” or “U.S. Suspect” animals be included in the human food production process.

Inasmuch as they categorically disqualify non-ambulatory animals from a slaughterhouse operation altogether, the “receipt and slaughter” provisions of Section 599f are outside the preemptive language of the FMIA.¹³

¹² The federal definition for nonambulatory livestock is nearly identical to the state definition. *See* 9 C.F.R. 309.2(b) (“Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column or metabolic conditions.”); *compare with* Cal. Penal Code § 599f(i) (“‘nonambulatory’ means unable to stand and walk without assistance”). The federal definition supplies examples, but does not specify how an inspector is able to discern a nonambulatory livestock from one merely “resting” – presumably because no explanation is needed. The argument from petitioner that nonambulation is a “symptom,” and difficult to discern for trained federal inspectors because it may change at any moment (Pet. Br. at 58-60), is a criticism that applies equally to the FMIA. Nonambulation is a characteristic that is evident and, like color or breed, readily identifiable at the time of euthanization.

¹³ Federal law requires that “amendable species” found with “symptoms of disease shall be set apart and slaughtered

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2. Arguments that Section 599f is preempted because of a federal need to conduct ante-mortem inspections are unavailing. *See* Pet. Br. at 30-31; Br. of the United States at 33; Veterinarians' Br. at 4-11. As a threshold matter, there is no evidence in the record that the provisions of the FMIA dealing with ante-mortem inspections would be affected by the plain language of Section 599f.¹⁴ There is only argument.

separately from all other cattle, sheep, swine, goats . . . and when so slaughtered the carcasses of said cattle, sheep, swine, goats . . . shall be subject to careful examination and inspection." 21 U.S.C. § 603(a). To the extent that such animals would be "nonambulatory" within the meaning of Section 599f, they would be excluded from the slaughterhouse operations. However, once the nonambulatory animal has been slaughtered, nothing in the California law prohibits the carcass of that animal from being inspected or examined by the proper authorities as required by the FMIA and the applicable federal regulations. Indeed, nothing in Section 599f even addresses, much less limits, post-mortem inspection of animals.

¹⁴ The Ninth Circuit correctly found that petitioner's argument "that section 599f will prevent the examination of downer animals for disease, hindering federal procedures designed to identify and stem the spread of disease" was not supported by the record. Pet. App. at 15a n.7. Indeed, California could hardly object to federal inspections intended to prevent the spread of communicable diseases to other herd animals. California has well-developed statutory provisions dealing with preventing the spread of such diseases, protecting consumers and producers. *See, e.g.*, Cal. Food & Agric. Code §§ 10781-10786 (West 2001) (statutes authorizing the adoption of regulations to control or eradicate hog cholera, swine brucellosis, pseudorabies, and other swine diseases); *see also generally* Cal. Food & Agric. Code §§ 9801-10610 (West 2001) (similar provisions for cattle

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Petitioner argues that the initial inspection is to determine if an animal should be “set apart” and “slaughtered separately” so that their carcasses can be “subject to a careful examination and inspection.” Pet. Br. at 31. Manifestly, Section 599f would accomplish the purpose of this initial inspection. As noted earlier, Section 599f says nothing about post-mortem inspections. Any federal inspections or examinations of the euthanized pig could still take place. The purpose of both federal and state regulation is to ensure that suspect meat not be admitted into the human food production process.¹⁵

Petitioner argues that only federal inspectors may make a decision whether an animal’s carcass should be included as “meat,” and whether or not the meat is “adulterated.” Pet. Br. at 31-32. However, nothing in federal law mandates that an “unadulterated” carcass be admitted into human food production; the “adulteration” inspection merely removes a *federal* obstacle to including the carcass as human

diseases); Cal. Food & Agric. Code §§ 9101-9501 (West 2001) (statutes regarding diseased animals and poultry and quarantine procedures for both).

¹⁵ Indeed, California’s categorical exclusion of non-ambulatory animals from food-production operations is consistent with federal recognition that some animals will not be processed for human consumption precisely because they were not available for ante-mortem inspection. *See* FSIS Directive 6100.1, Rev. 1 at V, 2 (recognizing that some animals will not be presented for ante-mortem inspection, and thus the federal inspectors may not permit the carcasses to be marked as “inspected and passed” and are not fit for human food).

food. No conflicting “adulteration or misbranding” determination is made by California. *See* Pet. Br. 32-34. Rather California is *categorically disqualifying* nonambulatory animals from human food production altogether.

Contrary to the views of the United States, *see* Br. of the United States at 21-23, precisely because Section 599f ensures that downer animals will not enter the human food supply in contravention of federal inspection and regulatory controls, the statute does not intrude upon the scope of federal authority. It cannot reasonably be argued that excluded nonambulatory animals must be considered to be within a slaughterhouse’s “operations” in order that *federal* law, rather than *state* law, provide the basis for ensuring that a carcass does not become human food.

3. Furthermore, consistent with the rubric that Congress will not be presumed to intend a displacement of state law, *Maryland v. Louisiana*, 451 U.S. at 746, the term “operations” should not be construed so broadly as effectively to write the “savings clause” out of 21 U.S.C. § 678. Construing “operations” to eclipse state involvement with any and every activity having to do with an animal at the federal slaughterhouse, as petitioner argues here, would needlessly nullify valid state concern for the welfare and humane treatment of animals proposed for slaughtering in human food production. As noted earlier, “when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept

the reading that disfavors pre-emption.’” *Altria Group, Inc.*, 555 U.S. at 77 (citation omitted).

Similarly, construing the term “operations” to encompass only those activities related to the processing of meat *that has not been disqualified* for human consumption by state law does no violence to congressional desire for uniformity in regulation of meat production for human consumption. As has already been noted, Congress was not so much intent in the FMIA to determine the *kinds* of animals that may end up on America’s food tables, as Congress was intent to regulate the *quality* and *marketing* of that animal food. 21 U.S.C. §§ 602, 603.

B. The Humane Treatment Provision Of Section 599f Is Not A Requirement Of The “Operations” Of A Slaughterhouse Preempted By The FMIA, And Is Consistent With That Act.

Animal welfare and the humane treatment of animals is an area of traditional state regulation. *See generally United States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577, 1583 (2010) (recognizing that all fifty states and the District of Columbia have animal cruelty laws); *see also* Brief for the United States at 24-28, *United States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577 (recognizing that animal cruelty laws first appeared during the colonial period and that every state had a law prohibiting animal cruelty by 1913). Section 599f requires that a slaughterhouse shall not

“hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.” Cal. Penal Code § 599f(c). The word “immediate” is not defined, but implementation of the statute need not necessarily be inconsistent with similar requirements of federal law.¹⁶

At a minimum, “taking immediate action” to euthanize pursuant to state law would obviate the need for later euthanization pursuant to federal law.¹⁷ And, as respondent pointed out above, nothing in state law limits the ability of federal agents to conduct any necessary or required post-mortem inspections.

And the fact that state law may require euthanization of animals that would not require “immediate” euthanization under federal law, such as animals classified as “U.S. Suspect,” does not make

¹⁶ Petitioner complains that Section 599f conflicts with 9 C.F.R. §§ 313.2(d)(1) and 313.1(c). *See* Pet. Br. at 47. Those provisions require that “animals unable to move shall be separated from normal ambulatory animals and placed in [a] covered pen” and the pen should be “sufficient, in the opinion of the inspector, to protect them from the adverse climatic conditions of the locale while awaiting disposition by the inspector.” In light of California’s concern for humane treatment of animals, it would not be reasonable to read the state statute’s requirement that a slaughterhouse “tak[e] immediate action to humanely euthanize the animal” as precluding provision of shelter while the animal awaits such humane euthanization.

¹⁷ Petitioner concedes, for example, that an animal classified as “U.S. Condemned” must be humanely euthanized. *See* 9 C.F.R. § 309.13(a).

California law inconsistent with the FMIA. The FMIA does not mandate that “U.S. Suspect” animals – or, indeed, any animals – be placed into the human food production process. Thus, the humane treatment provision of Section 599f(c) may reasonably be read as regulating the treatment of animals that, by virtue of state disqualification, are outside the purview of the FMIA.

The implicit claim by petitioner that there is risk to animal and human health and safety caused by section 599f’s provisions regarding immediate euthanization is conclusory and is not supported by the record in this case.¹⁸ Pet. Br. at 12-14, 17-18, 63. In any event, preventing the risks of the spread of widespread animal disease is not the purpose of the FMIA and this is illustrated by the fact that the federal government adopted a similar regulation with respect to the immediate humane euthanization of non-ambulatory cattle and a prohibition against including the carcasses of those animals in the food supply. 9 C.F.R. § 309.3(c); *see also* 74 Fed. Reg. 11463, 11463 (March 18, 2009).¹⁹ Presumably, this similar directive

¹⁸ *See supra* note 14.

¹⁹ The FSIS noted that this rule was changed to reduce uncertainty in determining the proper disposition of non-ambulatory disabled cattle and would eliminate the time FSIS public health veterinarians spend determining whether or not an animal can be tagged as “U.S. Suspect,” proceed to slaughter, and then be re-inspected after slaughter, thereby increasing the time inspection personnel can focus on other inspection activities. 74 Fed. Reg. at 11463.

from the federal government does not pose a significant risk to animal or human health either.

A reasonable reading of preemption language in 21 U.S.C. § 678 consistently with that statute's savings clause should not oust California of its insistence that animals – which are, in any event, disqualified from entry into the human food production process – be humanely treated and euthanized.²⁰



²⁰ In any event, these proceedings arise in the context of a motion for preliminary injunction. And, in connection with subdivision (e) of Section 599f, the Ninth Circuit concluded that petitioner failed to offer any evidence of irreparable injury or that the balance of equities and public interest did not favor enforcement of state law. *See* Pet. App. 17a.

CONCLUSION

The Ninth Circuit's decision should be affirmed.

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Respectfully submitted,

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