

No. 10-224

In the Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,
Petitioner,

v.

KAMALA D. HARRIS,
Attorney General of California, et al.,
Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit*

**BRIEF OF THE AMERICAN ASSOCIATION OF SWINE
VETERINARIANS, THE NATIONAL PORK PRODUCERS
COUNCIL AND THE NATIONAL FARMERS UNION
AS AMICI CURIAE IN SUPPORT OF PETITIONER AND
FOR REVERSAL OF THE NINTH CIRCUIT'S JUDGMENT**

LANCE W. LANGE
Counsel of Record
BELIN McCORMICK, P.C.
THE FINANCIAL CENTER
666 WALNUT STREET, SUITE 2000
DES MOINES, IOWA 50309
TELEPHONE: (515) 283-4639
EMAIL: lwlange@belinmccormick.com

*Counsel for Amici Curiae the
American Association of Swine
Veterinarians, the National
Pork Producers Council and
the National Farmers Union*

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- Corrie Brown, *Update on foot-and-mouth disease in swine*, 9 Journal of Swine Health and Production 5 at 239-242 (2001) 12, 18
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- Dan Flynn, *Foot & Mouth May Taint South Korean Bottled Water*, Food Safety News, May 10, 2011 17
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INTEREST OF THE *AMICI CURIAE*

The American Association of Swine Veterinarians (AASV), the National Pork Producers Council (NPPC) and the National Farmers Union (NFU) submit this brief as *amici curiae* in support of the Petitioner.¹

The AASV is a professional association of veterinarians who treat swine. The organization has approximately 1,300 members in practice, industry, and academia. The mission of the AASV is to increase the knowledge of swine veterinarians by promoting the development and availability of the resources which enhance the effectiveness of professional activities, creating opportunities which inspire personal and professional growth, advocating science-based approaches to industry issues, encouraging personal and professional interaction, and mentoring students to encourage life-long careers as swine veterinarians. AASV's website can be found at www.aasv.org.

As a national trade association for swine veterinarians, the AASV has a particular interest in representing the interests and perspective of the public health veterinarians (PHVs) who serve as federal inspectors in federally-regulated

¹ The National Meat Association and the Respondents have all consented to the filing of this brief after receiving timely notice from the *amici curiae*.

As required by Rule 37.6, the AASV, NPPC and NFU 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 its preparation or submission.

slaughterhouses. These professionals, who serve on the front lines of disease prevention at the slaughterhouse, have a strong interest in protecting the integrity of the federal ante-mortem and post-mortem inspection regime in order to protect animal and public health.

The NPPC is a § 501(c)(5) nonprofit corporation whose membership consists of forty-three state pork producer associations. The NPCC is a trade association dedicated to enhancing opportunities for the nation's thousands of pork producers. The NPPC conducts public policy outreach on behalf of its members and advocates for the passage and implementation of laws and regulations conducive to the production and sale of American pork in both domestic and international markets. The NPPC's website can be found at www.nppc.org.

As a trade association representing the interests of all pork producers in the United States, the NPPC has a particular interest in both (1) protecting the industry by promoting animal and public health, and (2) preserving the economic viability of the business of raising pigs for slaughter. Pork producers recognize the severe threat posed to the industry by the loss of a uniform federal meat inspection regime and the related increase in the potential for a cataclysmic outbreak of a foreign animal disease.

The NFU is a trade association of farmers operating small- and medium-sized farms throughout the United States. For more than 100 years, the NFU has been the grassroots organization of America's family farms and ranches. The NFU's mission is to advocate for the economic and social well-being of

family farmers, ranchers, fishermen, and for consumers and their communities, through education, cooperation and legislation. The NFU advocates for sustainable production of food, fiber, feed and fuel. The NFU's website can be found at www.nfu.org.

The NFU has an interest in representing the perspective of family farmers, including many pork producers. Family farmers recognize the severe threat posed to the industry by the loss of a uniform federal meat inspection regime and the related increase in the potential for a cataclysmic outbreak of a foreign animal disease.

This case will significantly impact meat inspection practices across the country. Swine veterinarians, pork producers, and family farmers have a strong interest in such practices, which directly affect their livelihoods and practices. They are also well-positioned to explain the impact of this case on hogs and on humans who consume hogs. The AASV, NPPC and NFU respectfully request that this Court reverse the judgment of the court of appeals.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling permits California to criminalize a federally-mandated process for inspecting pigs at the slaughterhouse. The decision places pork producers and slaughterhouses in an untenable Catch-22: either ignore federal regulations or violate a California penal statute. The decision also endangers public health by short-circuiting an ante-mortem inspection regime essential to detecting outbreaks of disease. Finally, the decision's economic impact could devastate the pork industry. For these

reasons, and those in the Petitioner’s Brief, this Court should reverse.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN NOT APPLYING EXPRESS PREEMPTION TO PRESERVE THE INTEGRITY OF THE FEDERAL MEAT INSPECTION REGIME.

California Penal Code § 599f(c) makes it a crime for a slaughterhouse to hold a nonambulatory pig in California without immediately euthanizing it. Pursuant to the express preemption provision of the Federal Meat Inspection Act (the “FMIA”), 21 U.S.C. § 601, *et seq.*, however, “[r]equirements within the scope of [the FMIA] with respect to the premises, facilities and operations of any establishment at which inspection is provided . . . 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). Thus, if § 599f(c)’s immediate euthanization mandate is “different than” the FMIA’s regulations, and if it concerns the “operations” of a federally-inspected slaughterhouse, it is expressly preempted. Both prerequisites for preemption are satisfied.

First, there can be little doubt that California’s mandate is “different than” the federal regime. Pursuant to the regulations implementing the FMIA, federal inspectors must perform ante-mortem inspection of all livestock “offered for slaughter.” 9 C.F.R. § 309.1. If livestock are found to be nonambulatory, they must be “separated from normal ambulatory animals and placed in [a] covered pen” for further inspection. *Id.* § 313.2(d)(1). By mandating

that slaughterhouses immediately euthanize nonambulatory pigs, the California law precludes a slaughterhouse from separating the pigs or putting them in a covered pen. Plainly, then, the California statute imposes requirements “different than” those mandated by the federal regulations.

The real question in this case is whether the mandate regulates the “operations” of federally-inspected slaughterhouses. On an ordinary reading of the term “operations,” it does. Euthanizing a pig, as the California law requires, is unambiguously part of a slaughterhouse’s “operations.” The court of appeals nonetheless declared that § 599f(c) does not pertain to slaughterhouse operations. Its reasoning proceeded in three steps. First, citing cases from the Fifth and Seventh Circuits, the court ruled that the FMIA does not preclude states from regulating the “kind[s] of animals that may be slaughtered.” Pet. App. 9a. Second, the court reasoned that states need not determine amenability to slaughter on a species-wide basis. Pet. App. 10a. Third, the court ruled that the California law is not preempted because nonambulatory pigs are a different “kind of animal” than ambulatory pigs. Pet. App. 10a-11a.

Even if the first two legs of the court of appeal’s reasoning are correct – and they are dubious in themselves – the third fails. A nonambulatory pig is still a pig. Meat produced from healthy nonambulatory pigs is indistinguishable from the meat produced from healthy ambulatory pigs. Healthy pigs sometimes lie down due to fatigue. *See Joe Vansickle, Will ‘Downer’ Sows Be Next? National Hog Farmer, July 15, 2008, available at <http://nationalhogfarmer.com/behavior-welfare/0715-groups-usda-ban/>*

(last visited Aug. 24, 2011) (“Pigs become fatigued from overexertion, turning them into downers when they are not given proper rest.”); *see also* FSIS Directive 6900.2, Rev. 2, Ch. III, B (acknowledging that some hogs are fatigued and “tend to lie down and in some cases may get knocked down by others in the lot.”). Doing so does not make them any less “pigs.” Pigs with the *symptom* of nonambulation are simply not different “kinds of animals.” Thus, even if states may regulate certain “kinds of animals” as categories within a species, California has not done so in § 599f(c). As such, its statute regulates the “operations” of federally-inspected slaughterhouses and is preempted by 21 U.S.C. § 678.²

II. CALIFORNIA’S IMMEDIATE EUTHANIZATION MANDATE WOULD HARM ANIMAL AND PUBLIC HEALTH.

The court of appeals’ failure to apply the FMIA’s preemption provision will have a potentially devastating impact on animal health and public health. The California law jeopardizes critical components of the federal meat inspection process. If it goes into effect, California will rely solely on a post-

² This brief focuses primarily on § 599f(c). In addition, § 599f(a) prohibits slaughterhouses from buying nonambulatory pigs. Since slaughterhouses typically purchase pigs only after they have passed an ante-mortem inspection, the California law plainly interferes with a core operational function of a slaughterhouse: purchasing animals for slaughter. If pigs must be immediately euthanized before they can pass an ante-mortem inspection, California will have effectively prevented pigs from being purchased and placed in the food supply. Thus, § 599f(a) differs from the requirements of the FMIA and is preempted.

mortem inspection regime to detect swine diseases. For two reasons, this change in practice at slaughterhouses would have catastrophic results. First, as myriad federal regulations recognize, *ante-mortem* inspection of nonambulatory pigs is essential to the detection of infectious diseases, such as Foot and Mouth Disease (“FMD”). Second, because the California law prohibits slaughterhouses from receiving nonambulatory animals, California’s post-mortem inspection regime is incomplete and ineffectual.

A. THE FMIA ESTABLISHES A UNIFORM ANTE-MORTEM INSPECTION PROCESS, WHICH IS CRITICAL TO PREVENT THE SPREAD OF INFECTIOUS DISEASES AMONG ANIMALS.

Under federal law, an ante-mortem inspection of nonambulatory swine is required at slaughterhouses. 9 C.F.R. § 309.1. Ante-mortem inspections serve at least two purposes: (1) to determine eligibility for slaughter, and (2) to serve as a front-line detector of communicable diseases. Ante-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). Both of these foreign animal diseases (“FADs”) must be detected early to prevent their spread.

By depriving Food Safety and Inspection Service (FSIS) of information gained by conducting ante-mortem inspections, California ties the hands of federal veterinarians (known as Public Health Veterinarians or PHVs) in fighting the spread of

dangerous illnesses among swine (and potentially humans). The FSIS has created a comprehensive training program for federal veterinarians on the ante-mortem inspection of animals at the slaughterhouse. *See generally* FSIS, Livestock Slaughter Inspection Training, available at http://www.fsis.usda.gov/FSIS_Employees/Slaughter_Inspection_Training/index.asp (last visited Aug. 24, 2011). Some of the information sought during the ante-mortem inspection can be determined only by viewing the animal while it is still alive.³ *Id.* at 5. In fact, the FSIS manual contains an extensive list of symptoms of ailments that may only be determined through the abnormal body movement of the animal:

Abnormal Body Movement

Ante-mortem signs that indicate an animal may have a condition or disease referenced in the regulations can be associated with body movement and action, body position, condition, function, surfaces, discharges, and body odor. Some examples of the signs associated with body movement, action and position include:

1. Lameness or limping-sometimes the cause of lameness is rather obvious; sometimes not.

³ Ante-mortem inspection allows the federal veterinarian to see a nonambulatory pig “in motion.” Nothing in the federal regulations suggests that an ante-mortem inspection of an animal “in motion” means that the animal must be ambulatory for the purpose of seeing the animal move. A pig may demonstrate sufficient motion for the ante-mortem inspection while lying down.

2. Stiffness and pain-lameness may be caused by arthritis in one or more joints.

3. Central Nervous System (CNS) diseases-certain diseases such as rabies and listeriosis can affect the brain and CNS. The animal may appear extremely nervous or restless, excessively anxious or upset, or stagger or circle.

4. Certain poisons and toxic residues that the animal has been exposed to may cause abnormal movement and action, such as staggering or circling.

5. Depression or disinterest may be a sign that the animal is in a dying or moribund state. A moribund animal may not respond to noises or other stimuli. Animals in a moribund condition are not eligible for slaughter.

6. It is possible that an animal that is depressed or fails to respond normally to stimuli could be under the influence of a tranquilizer. Tranquilized animals are not eligible for slaughter. Tranquilizers and other drugs have specific withdrawal periods that must elapse before the animal is eligible for slaughter.

7. An animal may be disoriented and run into things or butt its head against objects.

8. Animals may scratch excessively or rub their hide against objects. Scratching and rubbing associated with hair loss may indicate that the animal has lice or mange infestation.

Scabies is a mange condition that is a reportable disease. The PHV must report this condition to other health agencies. These agencies may want to take skin scrapings from the animal to confirm the diagnosis.

9. Animals may have muscle tremors or shivering, hold their head to one side, or have any number of abnormal gaits.

10. Animals may strain and assume abnormal body positions. For example, urinary or intestinal disorders may cause straining and abnormal positions such as arching of the back, tucking in of the abdomen (stomach), and extending the neck and tail.

11. An animal may have difficulty in rising or be unable to get up at all or be standing but unable to walk (or ambulate). These animals may be recumbent nonambulatory or standing nonambulatory for a variety of reasons ranging from an injury to severe illness or depression. All nonambulatory livestock must be examined by the PHV. The PHV may choose to examine these animals where they are rather than move them to the U.S. Suspect pen to avoid unnecessary handling and pain or injury to the animal. All cattle that are nonambulatory when presented for ante-mortem must be condemned.

Id. at 11-12. In addition, the FSIS manual requires that federal veterinarians take the temperature of each animal during the ante-mortem inspection process, which is impossible post-mortem. *Id.* at 11, 14. Certain animals are condemned on the basis of

their body temperature alone. *Id.* at 14; 9 C.F.R. § 309.3(c). Taken together, these federal ante-mortem inspection procedures are critical in preventing the spread of diseases, such as hog cholera and swine vesicular disease. *See* 9 C.F.R. § 309.5 and 9 C.F.R. § 309.15.

The FSIS recognizes at least fourteen (14) different FADs. FSIS, Entry Training for the PHV, “Reportable and Foreign Animal Diseases,” at 1, *available at* http://www.fsis.usda.gov/PDF/PHVj-Reportable_and_Foreign_Animal_Diseases.pdf (last visited Aug. 24, 2011). Among those FADs, perhaps the most serious threat is posed by FMD. One of the first visible symptoms of FMD (or swine vesicular disease, which is very similar) is lameness, which is a symptom tested for under the ante-mortem inspection regulations. *Id.* at 47; *see also Foot and Mouth Pocket Guide*, USDA/APHIS, NPPC, Iowa State University and AASV 25 (2011), *available at* <http://www.cfsph.iastate.edu/pdf/foot-and-mouth-disease-pocket-guide> (last visited Aug. 26, 2011) (stating that the first visible sign of FMD is a lame pig). One can only detect this symptom if the infected pig is given time to rest and stand back up after it has recovered from being nonambulatory. However, this inspection will never occur in California if the nonambulatory pigs are already euthanized. In short, the California law requires that a nonambulatory pig be euthanized before a veterinarian has had the opportunity to observe any of the early symptoms of FMD, which include lameness, shaking of the feet, salivation and drooling, dullness and lack of appetite, vesicles on the mouth, etc. *See* D. Herenda, *Manual on meat inspection for developing countries*, Food and Agriculture Organization of the United Nations, Ch. 4,

2000, *available at* <http://www.fao.org/docrep/003/t0756e/T0756E05.htm> (last visited Aug. 24, 2011).

The proper response to early detection of FMD through ante-mortem inspection is a quarantine of the facility. California's law dismantles this critical early warning detection system that has developed through FSIS regulations and makes a severe FMD outbreak in the United States a very real threat.⁴ Without an immediate quarantine of the slaughterhouse, the disease will spread quickly.

In short, § 599f(c) turns federal veterinarians into coroners tasked only with the autopsies of a newly-expanded number of often-healthy nonambulatory swine that were subject to immediate euthanization. By mandating "immediate" euthanization of such animals, federal veterinarians are deprived of the benefit of examination while the pig is still alive. The retrieval of such ante-mortem data would be a crime under § 599f(c), even though the ante-mortem inspection would allow for the only means of detection of certain communicable diseases in swine. Detecting a communicable disease early within a swine population could be critical in preventing the spread of the disease. Section 599f(c) places the health of both swine and humans at unnecessary risk. Immediately euthanizing nonambulatory swine does nothing to

⁴ "It is probably no longer a question of 'if' but 'when' FMD strikes the US. Our only realistic hope of controlling a domestic incursion will be to diagnose it at the very earliest possible moment." Corrie Brown, *Update on foot-and-mouth disease in swine*, 9 *Journal of Swine Health and Production* 5 at 239-242 (2001), *available at* <http://www.aasv.org/shap/issues/v9n5/v9n5p239.html> (last visited Aug. 24, 2011).

improve the public health. Quite the opposite, it threatens the public health by preventing ante-mortem inspection of “downer” swine.⁵

B. CALIFORNIA’S LAW IS ALSO INEFFECTUAL TO THE EXTENT THAT IT WILL RELY SOLELY ON POST-MORTEM INSPECTION TO DETECT DISEASE.

If the California law goes in effect, federal veterinarians at California slaughterhouses will be left to rely entirely on a post-mortem inspection regime to identify FADs.

California’s post-mortem inspection process, however, will not occur when the nonambulatory pig is not received by the slaughterhouse. The California law requires that pigs be turned away from the slaughterhouse premises, for example, if they are nonambulatory on the truck. Cal. Pen. Code § 599f(a) (banning a slaughterhouse from receiving a nonambulatory animal). A truck carrying livestock becomes part of the slaughterhouse premises as the vehicle physically enters the slaughterhouse grounds. *See* FSIS Directive 6900.2, Rev. 2, Ch. II, I. (“Once a

⁵ The process of ante-mortem inspection can be viewed as an early-warning detection system that, when in operation, allows the on-site federal veterinarians to make the crucial decision of whether to separate or quarantine the entire swine herd. Post-mortem inspection alone would not allow for this type of early detection of communicable diseases. Regardless, § 599f supersedes the federal regulations that would allow for a nonambulatory pig to be safely separated from the rest of the herd and placed in a covered pen. *See* 9 C.F.R. § 313.2(d)(1).

vehicle carrying livestock enters, or is in line to enter, an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises. The animals within that vehicle are to be handled in accordance with 9 CFR 313.2.”). Neither ante-mortem nor post-mortem inspections will ever occur with such livestock under the California regime, since the pigs are never allowed on the premises. Thus, California's reliance solely on a post-mortem inspection regime is ineffectual.

III. THE NINTH CIRCUIT'S DECISION WILL HARM THE PORK INDUSTRY.

The economic impact of California's immediate euthanization mandate on the California pork industry (and ultimately the national pork industry) could be devastating, for two reasons. First, as explained above, the mandate threatens an FMD outbreak. The impact of such an outbreak would be massive. Second, the mandate requires pork producers and slaughterhouses to dispose of healthy animals.

In addition to training federal veterinarians on how to conduct ante-mortem inspections, the FSIS has also issued a directive specifically describing the responsibility of federal veterinarians to prevent the spread of FADs. FSIS Directive 6000.1, Rev. 1, Part VI & VII, *available at* <http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/6000.1Rev1.pdf> (last visited Aug. 24, 2011). An FSIS entry-level training module for PHVs describing the threat of FADs states:

The volume of international passenger travel is steadily increasing. In 1980, 20 million passengers arrived in the United States on

international flights. In 1995, this number rose 131 percent to 47 million []. The airline industry expects this trend to continue. International travelers may unknowingly bring contaminated animal products from FAD infected countries. Contaminated foodstuffs have often served as a source of a FAD in the United States and other countries [].

As the world population grows and animal production intensifies, the risks and impacts of FAD incursions increase. Today, infection at one premises can affect 300,000 laying hens, 100,000 hogs, or 100,000 feedlot cattle. When one company owns a large number of animals, frequent and rapid interstate movement occurs. This movement can spread infection across many states before clinical signs are manifest in the source herd.

See FSIS, Entry Training for the PHV, “Reportable and Foreign Animal Diseases,” at 5, *available at* http://www.fsis.usda.gov/PDF/PHVj-Reportable_and_Foreign_Animal_Diseases.pdf (last visited Aug. 24, 2011). The spread of such FADs would have staggering impact on the livestock industries if not prevented through early detection. *Id.*

The physical swine losses in a domestic FMD outbreak would be substantial. As a benchmark, the current outbreak in South Korea has led to the loss of 33% of that country’s swine herd at a cost of \$1.75 billion. Bryan Kay, *South Korean farmers assess fallout of major outbreak of foot and mouth disease*, Christian Science Monitor, Feb. 24, 2011, *available at* <http://www.csmonitor.com/World/Asia-Pacific/2011/>

0224/South-Korean-farmers-assess-fallout-of-major-outbreak-of-foot-and-mouth-disease (last visited Aug. 24, 2011). The size of the hog market in the U.S. is eight times the size of the South Korean hog market. A study published by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service estimated that the agricultural welfare loss from an FDM outbreak in California would be between \$2.3 billion and \$69 billion, depending on the length of the delay in detection. Tim E. Carpenter, Joshua M. O'Brien, Amy D. Hagerman, Bruce A. McCarl, *Epidemic and economic impacts of delayed detection of foot-and-mouth disease: a case study of a simulated outbreak in California*, 23 *Journal of Veterinary Diagnostic Investigation* 1, at 26-33 (2011), available at <http://fazd.tamu.edu/2011/01/epidemic-and-economic-impacts-of-delayed-detection-of-foot-and-mouth-disease-a-case-study-of-a-simulated-outbreak-in-california/> (last visited Aug. 24, 2011). In addition, an outbreak would likely cause consumers to irrationally shun pork (as they did during the recent H1N1 virus outbreak). *FMD Outbreak in South Korea Will Be Felt for Years*, *National Hog Farmer*, Mar. 21, 2011, available at <http://nationalhogfarmer.com/pork-quality/fmd-outbreak-in-south-korea-will-be-felt-for-years-0321/> (last visited Aug. 24, 2011). Exports would shut down, and producers would simultaneously face

increased costs in eradicating the deadly disease.⁶
This drop in exports would have a decisive impact:

Economically, [FMD] is the most important disease of animals in the world. Period. Presence of this disease in a national herd destroys all export possibilities and hinders production so severely that profits for the domestic market evaporate. The disease itself has a low mortality rate but an incredibly high morbidity rate. Affected animals lose production for 2 to 3 weeks, and because of the highly contagious nature of the disease, all animals in a herd are infected. In industrialized systems of agriculture, this short period of poor growth is all it takes to wipe out profits, and countries with significant agricultural exports expend tremendous efforts

⁶ An important, but ancillary, cost of eradication is the disposal of diseased carcasses in order to comply with environmental regulations and prevent the contamination of groundwater from the leaching of the buried carcasses. The haphazard disposal of diseased carcasses of swine in South Korea has led to concerns of a looming environmental disaster created by the sheer volume of liquefied remains entering the water table. Philippe Messmer, *Public health worries after foot and mouth epidemic in South Korea*, Guardian Weekly, Feb. 15, 2011, available at <http://www.guardian.co.uk/world/2011/feb/15/south-korea-foot-mouth-mesmer> (last visited Aug. 24, 2011); see also Dan Flynn, *Foot & Mouth May Taint South Korean Bottled Water*, Food Safety News, May 10, 2011, found at <http://www.foodsafetynews.com/2011/05/south-korea-foot-mouth-disease-threat-to-bottled-water/> (last visited Aug. 24, 2011); *South Korea Reportedly Buries 1.4 Million Pigs Alive to Combat Foot and Mouth Disease*, The Huffington Post, Jan. 12, 2011, available at http://www.huffingtonpost.com/2011/01/12/south-korea-buries-pigs-alive_n_808119.html (last visited Aug. 24, 2011).

to keep their national herds free of this virus. Once the virus is known to be present, export markets drop to zero, and without exports, domestic markets soon become glutted and worthless.

Corrie Brown, *Update on foot-and-mouth disease in swine*, 9 *Journal of Swine Health and Production* 5 at 239-242 (2001), available at <http://www.aasv.org/shap/issues/v9n5/v9n5p239.html> (last visited Aug. 24, 2011). FMD is so virulent that it has been identified as a national security threat. See, e.g., Devlin Barrett, *Officials brace for foot-and-mouth scare*, USA Today, Oct. 15, 2007, available at http://www.usatoday.com/news/washington/2007-10-15-2261637160_x.htm (last visited Aug. 24, 2011) (“When there were fears of a foot-and-mouth outbreak in the Midwest this summer, the White House received secret briefings that highlighted the potential for old farm diseases to be new national security threats.”). In short, a single FMD outbreak in the United States could destroy the pork industry.

Beyond the nightmare scenario involving an outbreak of FMD, California’s immediate euthanization mandate requires the pork industry to needlessly cull healthy animals from the herd. Nonambulatory pigs are not necessarily permanently sick or diseased. A high percentage of pigs that become nonambulatory are simply fatigued and will likely recover within a short period of time. AASV standards require that a pig be given at least three (3) hours to recover after being taken to a covered pen. (The comparable standard of the American Veterinary Medical Association is two (2) hours.) In fact, the FSIS acknowledges that some hogs received at the

slaughterhouse are fatigued, need protective handling and “tend to lie down and in some cases may get knocked down by others in the lot.” *See* FSIS Directive 6900.2, Rev. 2, Ch. III, B. Most of these pigs recover and stand up within that period of time and exhibit no symptoms of disease. Trucks entering slaughterhouse premises often have a number of temporarily nonambulatory pigs. Read literally, the California law requires the slaughterhouse to turn away any truck that contains one or more nonambulatory pigs before it enters the premises, even though the pigs are likely fatigued and not diseased.⁷ Cal. Pen. Code § 599f(a) (stating that slaughterhouses are not permitted to “receive a nonambulatory animal.”) Worse yet, such a truck could contain a pig with an undetected FMD infection.

It is difficult to measure the true economic cost that the California law imposes on the pork industry, given the vagaries of estimating how many pigs will happen to be fatigued as a truck enters the slaughterhouse premises on a given day. Pork producers, however, often operate with slim profit margins; the loss of even a few healthy pigs as the result of the California law could lead a producer to bankruptcy. A single adult pig going to slaughter is the result of thousands of dollars of investment in breeding, feed, medicine and

⁷ Note that while § 599f(c) requires a slaughterhouse (and only a slaughterhouse) to immediately euthanize, § 599f(d) allows stockyards, dealers, auctions and market agencies the choice of euthanizing or “provid[ing] immediate veterinary treatment.” This distinction inexplicably singles out slaughterhouse operations and is inconsistent with the purported and misguided purpose of the California law to keep nonambulatory animals out of the food supply.

farm labor. The California law threatens to make raising pigs economically unviable.

CONCLUSION

For the foregoing reasons, as well as those in the brief of the Petitioner, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

Lance W. Lange
Counsel of Record
Belin McCormick, P.C.
The Financial Center
666 Walnut Street, Suite 2000
Des Moines, Iowa 50309
Telephone: (515) 283-4639
Email: lwlange@belinmccormick.com

*Counsel for Amici Curiae the
American Association of Swine
Veterinarians, the National Pork
Producers Council and the National
Farmers Union*

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