

No. 10-224

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In the Supreme Court of the United States

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NATIONAL MEAT ASSOCIATION, PETITIONER

v.

KAMALA D. HARRIS, ET AL.

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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 UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER

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### QUESTION PRESENTED

The Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, expressly preempts any state law that imposes “[r]equirements within the scope of [the Act] with respect to premises, facilities and operations” of any slaughterhouse inspected under the Act that are “in addition to, or different than” requirements under the Act. 21 U.S.C. 678. The question presented is whether 21 U.S.C. 678 preempts California Penal Code § 599f, which requires, *inter alia*, the immediate euthanasia of nonambulatory swine at slaughterhouses subject to the Act.

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**INTEREST OF THE UNITED STATES**

The Food Safety and Inspection Service (FSIS), an agency in the United States Department of Agriculture, has primary responsibility for enforcing the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.* The United States has a strong interest in the correct interpretation of the Act's express preemption provision, 21 U.S.C. 678, which ensures that FSIS can discharge its duties at federally regulated slaughterhouses free from unwarranted intrusion by state law. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

## STATEMENT

1. For more than a century, federal law has regulated a broad range of activities at slaughterhouses to ensure the safety of meat and meat food products. See Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1260. That law has been amended several times and is now designated as the Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 *et seq.* The FMIA regulates matters such as the humane handling and slaughter of cattle, sheep, swine, goats, and equines; the ante-mortem selection of animals suitable for slaughter for human food; the post-mortem inspection of carcasses; sanitary conditions for slaughtering and processing; the marking and labeling of meat and meat food products; and commerce in adulterated meat and meat food products. See 21 U.S.C. 603-604, 607-610.

a. Two components of the FMIA's regulatory framework are particularly relevant here. The first is its ante-mortem and post-mortem inspections. The Act directs the Secretary of Agriculture (USDA) to inspect animals "before they shall be allowed to enter into any slaughtering \* \* \* establishment" and requires that those animals that "show symptoms of disease" be "set apart and slaughtered separately" from other animals. 21 U.S.C. 603(a). The FMIA further directs USDA to make "a post mortem examination and inspection of the [slaughtered animal] carcasses and parts thereof \* \* \* to be prepared \* \* \* as articles of commerce which are capable of use as human food." 21 U.S.C. 604. USDA is authorized to make "such rules and regulations as are necessary for the efficient execution of the provisions of [the FMIA]." 21 U.S.C. 621.

Second, in the Humane Methods of Slaughter Act of 1958 (HMSA), Pub. L. No. 85-765, 72 Stat. 862, Con-

gress established a federal policy regarding the humane handling and slaughter of livestock. The HMSA declares that “[n]o method of \* \* \* handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane,” and it authorizes USDA to “designate methods \* \* \* of handling in connection with slaughter which, with respect to each species of livestock, conform to th[at] policy.” HMSA §§ 2, 4(b), 72 Stat. 862-863 (7 U.S.C. 1902, 1904(b)).

As originally enacted, the HMSA applied only to “[federal] procurement and price support programs and operations.” HMSA § 3, 72 Stat. 862. In 1978, Congress extended the HMSA to all federally inspected slaughterhouses by “amend[ing] the Federal Meat Inspection Act to require that meat inspected and approved under such Act be produced only from livestock slaughtered in accordance with humane methods.” Humane Methods of Slaughter Act of 1978 (HMSA 1978), Pub. L. No. 95-445, 92 Stat. 1069. In particular, Congress amended the FMIA to require USDA to make “an examination and inspection of the method by which [livestock] are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under [the FMIA],” and to authorize USDA to refuse inspection at a slaughtering establishment if livestock “have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with the [HMSA].” HMSA 1978 § 2, 92 Stat. 1069 (adding 21 U.S.C. 603(b)). Congress also directly required slaughterhouses to comply with the HMSA. HMSA 1978 § 3, 92 Stat. 1069 (amending 21 U.S.C. 610).

b. The Food Safety and Inspection Service is the public health agency in USDA responsible for ensuring

that the Nation's commercial supply of meat, poultry, and egg products is safe, wholesome, and correctly labeled and packaged. FSIS employs more than 8000 full-time inspectors, public health veterinarians, and other front-line personnel, who are responsible for approximately eight million food-safety and food-defense verification procedures annually. As relevant here, FSIS administers all aspects of the FMIA, including inspections and humane-handling requirements (see 9 C.F.R. 300.1 *et seq.*) at approximately 800 establishments in the United States that slaughter livestock. In fiscal year 2010, FSIS inspected about 147 million head of livestock and conducted more than 126,000 humane-handling verification procedures under the FMIA. See *2012 USDA Budget Explanatory Notes, Food Safety and Inspection Service* 21-4, 21g-3, 21g-4, <http://www.obpa.usda.gov/21fsis2012notes.pdf> (discussing scale of FSIS activities in connection with Fiscal Year 2012 budget request); FSIS Directive 6900.2 (rev. 2, Aug. 15, 2011) (Pet. Br. App. 108-137) (describing humane-handling verification procedures, documentation, and responses to noncompliance); FSIS Directive 6100.1 (rev. 1, Apr. 16, 2009) (Pet. Br. App. 44-84) (describing ante-mortem livestock inspection procedures).

FSIS regulations establish, *inter alia*, standards for the good repair of slaughterhouse facilities to avoid injury to livestock; practices for humanely driving animals within the establishment; and rules for the humane handling of diseased or disabled animals. See generally 9 C.F.R. 313.1-.2. FSIS regulations also establish a system of identifying certain animals as condemned and unsuitable for human food; identifying other animals as potentially unsuitable for human food (in whole or in part), subject to further examination; and passing other

animals for slaughter. See generally 9 C.F.R. Pts. 309-310.

Animals must be handled humanely at all times on the slaughterhouse premises. FSIS Directive 6100.1 (Part VIII.A.1) (Pet. Br. App. 47) (“All animals that are on the premises of the establishment, on vehicles that are on the premises, or animals being handled in connection with slaughter (e.g., livestock on trucks being staged for slaughter) are to be handled humanely.”). To that end, FSIS regulates the means by which a slaughterhouse may drive or move animals. 9 C.F.R. 313.2(a)-(c). Of particular relevance here, those regulations cover both normal ambulatory animals and animals that refuse to move despite having no condition disabling them from moving (*i.e.*, nonambulatory but not disabled animals).

All livestock are “examined and inspected on the day of and before slaughter,” 9 C.F.R. 309.1(a), by an FSIS inspector and, as needed, an FSIS veterinarian. Animals not suspected of being affected with any disease or condition that would prevent their use as human food are passed for slaughter. Animals showing symptoms of certain diseases or conditions are classified by an FSIS veterinarian as “U.S. Condemned.” 9 C.F.R. 309.3-.9 and .15-.16; see 9 C.F.R. 301.2. Such animals may not be used as human food, and they must be killed apart from the slaughtering facilities where human food is produced. 9 C.F.R. 309.13. Their carcasses must be handled and disposed of so as not to adulterate products for human consumption. See 9 C.F.R. Pt. 314.

Animals found or suspected on ante-mortem inspection to be affected with certain other diseases or conditions are classified by an FSIS veterinarian as “U.S. Suspect.” 9 C.F.R. 309.2(c)-(h) and (j)-(l); see 9 C.F.R.

301.2. In addition, “seriously crippled animals and non-ambulatory disabled livestock shall be identified as U.S. Suspects.” 9 C.F.R. 309.2(b).<sup>1</sup> U.S. Suspects “shall be set apart and shall be slaughtered separately from other livestock.” 9 C.F.R. 309.2(n); see FSIS Directive 6900.2, at 14-15 (Pet. Br. App. 125-127). As a matter of humane handling, U.S. Suspects (including nonambulatory disabled animals) must be kept in a covered pen with access to water (and if held more than 24 hours, feed), pending observation and disposition by an FSIS veterinarian. 9 C.F.R. 313.1(c); see 9 C.F.R. 313.2(d)-(e) (governing treatment of “animals unable to move”).

For swine, the observation period and ante-mortem inspection allow FSIS to determine the nature of the animal’s condition. At one extreme, swift action must be taken if the affected animal has a condition that signals disease spreading within the herd or that could reflect a threat to the larger swine population. For example, 9 C.F.R. 309.15 requires federal inspectors to notify local, state, and federal livestock sanitary officials “when any livestock is found to be affected with a vesicular disease,” which includes the highly communicable and potentially economically devastating foot-and-mouth disease. At the other extreme, an animal initially designated as “U.S. Suspect” because of a treatable condition may sometimes be held for treatment, reinspected, and released for slaughter without the “U.S. Suspect” designation. See 9 C.F.R. 309.2(g) and (i)-(k).

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<sup>1</sup> Nonambulatory disabled full-grown cattle are subject to a different rule. Such animals are automatically condemned because the inability to walk is a symptom of bovine spongiform encephalopathy (“mad cow disease”). See 9 C.F.R. 309.3(e); 69 Fed. Reg. 1862 (2004); 72 Fed. Reg. 38,700 (2007); 74 Fed. Reg. 11,463 (2009).

The carcasses of animals ultimately classified as “U.S. Suspect” are disposed of as provided in 9 C.F.R. Part 311. Those regulations guide FSIS inspectors’ discretion in determining upon post-mortem examination which parts, if any, of a suspect carcass may be salvaged as unaffected by the disease or condition that warranted the animal’s identification as “U.S. Suspect”—and thus may be processed into meat and meat food products for human consumption.

After slaughter and post-mortem inspection, slaughterhouses and other establishments butcher and process carcasses into meat and meat food products. FSIS inspectors examine those products and the establishments in which they are prepared to determine if the products are “adulterated,” a term embracing a range of conditions that make meat unsuitable for commerce or unsuitable for use as human food. See 21 U.S.C. 606(a) (Supp. II 2008) (requiring inspections); 21 U.S.C. 601(m) (defining “adulterated”); 9 C.F.R. Pt. 318 (implementing regulations).

c. As originally enacted, the FMIA regulated only slaughterhouses slaughtering livestock and preparing meat and meat food products for interstate or foreign commerce. See, *e.g.*, 21 U.S.C. 71 (1964) (providing only for inspections of livestock whose meat was “to be used in interstate or foreign commerce”). In 1967, however, Congress found that “[u]nwholesome, adulterated, or misbranded meat or meat food products”—whether or not in interstate or foreign commerce—“impair the effective regulation of meat and meat food products in interstate or foreign commerce” and “substantially affect such commerce” by “compet[ing] unfairly with the wholesome, not adulterated, and properly labeled and packaged articles.” Wholesome Meat Act (WMA), Pub.

L. No. 90-201, § 2, 81 Stat. 587-588 (21 U.S.C. 602). Accordingly, to facilitate “regulation by [USDA] and cooperation by the States,” § 2, 81 Stat. 588, the WMA amended the FMIA by marking the boundaries between federal and state slaughterhouse regulation in three ways that persist today.

First, the WMA reaffirmed that the FMIA always applies to the slaughtering of animals to produce meat for interstate and foreign commerce. See WMA § 2, 81 Stat. 584 (adding FMIA § 2(h), now codified at 21 U.S.C. 601(h), defining “commerce”). The WMA also reaffirmed that many of the FMIA’s requirements do not apply to personal or custom slaughtering. WMA § 11, 81 Stat. 591 (amending FMIA § 23, now codified at 21 U.S.C. 623(a), specifying exemption).

Second, the WMA established a framework for regulation of intrastate slaughtering. Each State is presumptively responsible for developing and enforcing, at slaughterhouses producing meat solely for distribution within the State, “requirements at least equal to those imposed under [the FMIA].” WMA § 15, 81 Stat. 596 (adding FMIA § 301(c)(1), now codified at 21 U.S.C. 661(c)(1)). USDA is authorized “to cooperate with the appropriate State agency in developing and administering \* \* \* a State meat inspection law.” WMA § 15, 81 Stat. 595 (adding FMIA § 301(a)(1), now codified at 21 U.S.C. 661(a)(1)).<sup>2</sup>

If, however, a State does not develop and enforce such a law—as California and about half the States have

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<sup>2</sup> Congress recently authorized USDA to permit interstate shipments by certain small state-inspected establishments. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 11015(a), 122 Stat. 1362 (adding 21 U.S.C. 683); 76 Fed. Reg. 24,714 (2011) (FSIS final rule implementing same).

not—USDA “shall \* \* \* designate such State as one in which the provisions of [the FMIA] shall apply to operations and transactions wholly within such State.” WMA § 15, 81 Stat. 596 (adding FMIA § 301(c)(1), now codified at 21 U.S.C. 661(c)(1)); see 9 C.F.R. Pt. 331 (listing such States, including California). Thus, in States without state law “requirements at least equal to those imposed under [the FMIA],” 21 U.S.C. 661(c)(1), the WMA made slaughtering for intrastate, interstate, and foreign commerce uniformly subject to the FMIA’s inspection regime.

Third, the WMA added the express preemption provision at issue in this case:

Sec. 408. Requirements within the scope of this Act [*i.e.*, the FMIA] with respect to premises, facilities and operations of any establishment at which inspection is provided under \* \* \* this Act, which are in addition to, or different than those made under this Act may not be imposed by any State.

§ 16, 81 Stat. 600 (adding FMIA § 408, now codified at 21 U.S.C. 678). That provision also includes a savings clause: “This Act shall not preclude any State \* \* \* from making requirement[s] or taking other action, consistent with this Act, with respect to any other matters regulated under this Act.” *Ibid.*

2. As originally enacted in 1994, California Penal Code § 599f prohibited certain actors from “buy[ing], sell[ing], or receiv[ing] a nonambulatory animal,” Cal. Penal Code § 599f(a) (West 1995), or “hold[ing] a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises,” *id.* § 599f(b). Section 599f(a) by its terms did not apply to slaughterhouses “inspected by

[USDA]”; Section 599f(b) did not contain such a clause, and so apparently applied to all slaughterhouses, though USDA is unaware of any state prosecution in connection with a federally inspected slaughterhouse. A violation of either provision was punishable by a maximum of six months of imprisonment and/or a \$1000 fine. *Id.* §§ 19, 599f(d) (West 1995).

Section 599f was amended in 2008. 2008 Cal. Legis. Serv. ch. 194 (West). The amendment extended Section 599f(a)’s existing bans to all slaughterhouses, including those that are federally inspected. Cal. Penal Code § 599f(a) (West 2010). It took away the option of removing a nonambulatory animal from the slaughterhouse premises, and thus required immediate euthanizing of any nonambulatory animal. *Id.* § 599f(c). It added a prohibition on “process[ing], butcher[ing], or sell[ing] meat or products of nonambulatory animals for human consumption.” *Id.* § 599f(b). And it increased the maximum penalty for violating Section 599f to one year of imprisonment and a \$20,000 fine. See *id.* § 599f(h).<sup>3</sup>

3. Petitioner is an association of meat packers and processors, including operators of swine slaughter-

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<sup>3</sup> The 2008 amendment preserved Section 599f(e)’s regulation of how slaughterhouses may move nonambulatory animals: “While in transit or on the premises of a \* \* \* 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.” The court of appeals and the district court both held that petitioner was likely to succeed on the merits of its preemption challenge to Section 599f(e), but the court of appeals vacated the preliminary injunction and remanded for findings about irreparable injury and the balance of the equities with respect to Section 599f(e) in particular. Pet. App. 16a-17a. The parties do not specifically challenge either the court of appeals’ determination that Section 599f(e) is likely preempted or its narrow remand order.

houses. Compl. ¶¶ 2-3, 7. Petitioner sued California officials, seeking to enjoin the enforcement of Section 599f against federally inspected swine slaughterhouses.

The district court granted petitioner's motion for a preliminary injunction. Pet. App. 18a-53a. As relevant here, the court concluded that 21 U.S.C. 678 expressly preempts Section 599f because the California law "alters the process and methods for the receipt of animals, the determination of the animal as 'disabled' or 'nonambulatory,'" and the rules regarding "handling of the nonambulatory animal." Pet. App. 36a-37a. The court explained that the FMIA and its implementing regulations "permit a slaughterhouse to set aside for further inspection an animal that is nonambulatory," but that Section 599f "expressly requires that the same animal be 'immediately' euthanized." *Id.* at 37a. The court therefore held that Section 599f "imposes inspection requirements upon federally inspected slaughterhouses which are in addition to or different than FMIA" and is expressly preempted by 21 U.S.C. 678. Pet. App. 37a.

The district court rejected respondents' argument that a nonambulatory animal is a "type of meat" that a State could choose to exclude from being introduced into the human food supply altogether, as it might with "horse meat or dog meat or rat meat." Pet. App. 38a-39a. "A pig is a pig. A pig that is laying down is a pig. \* \* \* California permits pigs to be produced for human consumption," and "[h]aving allowed pigs and swine to enter the food supply, California cannot alter the federally mandated requirements of inspection." *Id.* at 39a.

The district court found that petitioner "is faced with an immediate threat of irreparable harm" from the conflict between Section 599f and the FMIA and from the threat of criminal penalties. Pet. App. 48a. The court

further found that the equities favored enjoining enforcement of Section 599f in light of the “interest of protecting the quality of the food supply and the quantity of meat processed for human consumption, and because adequate enacted law minimizes the potential risk.” *Id.* at 52a.

4. The court of appeals vacated the preliminary injunction and remanded. Pet. App. 1a-17a. As relevant here, it concluded that 21 U.S.C. 678 does not expressly preempt Section 599f because, in the court’s view, Section 599f does not address the “premises, facilities [or] operations” of slaughterhouses, but rather “regulates the kind of animal that may be slaughtered.” Pet. App. 9a. The court reasoned that “the FMIA establishes inspection procedures to ensure animals that are slaughtered are safe for human consumption, but this doesn’t preclude states from banning the slaughter of certain kinds of animals altogether.” *Ibid.*

The court of appeals criticized the district court’s analysis as limiting a State to “excluding animals from slaughter on a species-wide basis.” Pet. App. 10a. It concluded instead that a State is free to “decide which animals may be turned into meat” based on “a host of practical, moral and public health judgments that go far beyond those made in the FMIA.” *Ibid.* The court acknowledged that “a state may go too far in regulating what ‘kind of animal’ may be slaughtered,” if it “effectively establish[es] a parallel state meat-inspection system” by “styl[ing] new [inspection] standards as a regulation of the ‘kind of animal’ that may be slaughtered.” *Id.* at 10a-11a. But the court concluded that this case did not require it to “decide what limits the express preemption provision places on such regulations.” *Id.* at 11a.

The court of appeals denied petitioner’s petition for rehearing, Pet. App. 57a-59a, but stayed its mandate pending disposition of the certiorari petition, see *id.* 54a-56a; Fed. R. App. P. 41(d)(2)(B). Accordingly, the district court’s preliminary injunction remains in force.

#### SUMMARY OF ARGUMENT

A. Petitioner challenges the provisions of Section 599f that forbid its members to “buy, sell, or receive a nonambulatory animal,” Cal. Penal Code § 599f(a); to “process, butcher, or sell meat or products of nonambulatory animals for human consumption,” *id.* § 599f(b); or to “hold a nonambulatory animal without taking immediate action to humanely euthanize the animal,” *id.* § 599f(c). The FMIA expressly preempts those provisions.

1. The challenged provisions of Section 599f are preempted because they impose “requirements” that are “within the scope of [the FMIA]” and “with respect to” slaughterhouse “operations,” but are “in addition to, or different than” requirements prescribed under the FMIA. 21 U.S.C. 678.

“*Requirements.*” The challenged provisions of Section 599f set forth “requirements” because they command a slaughterhouse to take certain actions and refrain from others in conducting its operations. Even the ban on selling meat from a nonambulatory animal is properly understood as a “requirement” because that sale ban enforces California’s underlying dictate to slaughterhouses about how they must handle nonambulatory animals up to and during slaughter.

“*Within the scope of [the FMIA].*” The challenged provisions of Section 599f concern how animals are handled at a slaughterhouse when they are unloaded from

the delivery truck, held pending ante-mortem inspection, sent for slaughter, and ultimately butchered and processed into meat and meat food products. Those subjects are within the scope of USDA's authority under the FMIA and are addressed at length in USDA regulations and FSIS directives.

*“With respect to \* \* \* operations.”* The challenged provisions of Section 599f regulate slaughterhouse operations—*i.e.*, the actions done as part of the practical work performed at the slaughterhouse. Like the FMIA's humane-handling and inspection requirements, the California law addresses practical aspects of how slaughterhouses must handle animals in connection with slaughter, and the conditions under which processing of the carcasses into meat and meat food products must occur.

*“In addition to, or different than.”* Section 599f's requirements regarding nonambulatory swine are not the same as those under the FMIA. Federal regulations do not prohibit the receipt or holding of nonambulatory swine; to the contrary, they contemplate that such animals will be received and address how they will be humanely handled and held. Nor do USDA regulations flatly prohibit processing the meat of nonambulatory swine for sale; rather, there is a system of ante-mortem and post-mortem inspections designed to pass carcasses of nonambulatory swine for human consumption in whole or in part if appropriate.

2. The court of appeals thought the challenged provisions of Section 599f were not preempted because they regulate “the kind of animal that may be slaughtered.” Pet. App. 9a. That reasoning is flawed. The court's “kind of animal” criterion has no basis in the text of 21 U.S.C. 678. Moreover, the court acknowledged that

“a state may go too far in regulating what ‘kind of animal’ may be slaughtered,” Pet. App. 10a, yet articulated no principle for discerning what regulations “go too far.”

B. The FMIA’s express preemption provision serves important structural and practical interests. Structurally, the preemption provision was one of several amendments the WMA made to the FMIA that marked the boundaries between federal and state authority over slaughterhouses. The FMIA leaves certain matters to the States—such as intrastate inspection programs—but federal law forbids a State from engrafting its preferred additions onto the federal scheme.

The FMIA’s preemption provision serves two particularly important practical interests here. First, it ensures that FSIS inspectors and veterinarians will have an adequate opportunity to conduct the FMIA-required ante-mortem inspection of nonambulatory animals. Those inspections are often the best way to detect potentially devastating diseases that may be spreading through livestock populations; veterinarians can in turn alert other officials who can act to prevent widespread economic harm and disruption of the meat supply. Second, the preemption provision protects from state interference the federal inspectors who work at slaughterhouses every day. If enforced, Section 599f would have a significant potential to create confusion and confrontation between those federal inspectors and state officials.

#### ARGUMENT

The challenged provisions of California Penal Code § 599f are requirements about slaughterhouse operations within the scope of the FMIA, but they differ from the pertinent federal requirements. Accordingly, 21 U.S.C. 678 preempts those provisions of state law.

That result properly vindicates the division of federal and state authority established by the FMIA. The challenged provisions of Section 599f intrude on a federal scheme designed to ensure the safety of particular carcasses for human consumption, to implement a national policy of humane handling, and to detect diseases that could destabilize the Nation’s meat supply by devastating livestock populations. The FMIA therefore precludes enforcement of California’s law at federally inspected slaughterhouses.

**A. The Federal Meat Inspection Act Expressly Preempts The Challenged Provisions Of Section 599f As Applied To Swine Slaughterhouses**

The FMIA expressly preempts the challenged provisions of Section 599f as applied to swine slaughterhouses because California’s law would dictate how federally regulated slaughterhouses must conduct operations involving nonambulatory animals.

**1. Section 599f is preempted under the plain terms of 21 U.S.C. 678**

Because 21 U.S.C. 678 expressly addresses preemption of state law, analysis of the preemption question “must in the first instance focus on the plain wording of [that provision], which necessarily contains the best evidence of Congress’ pre-emptive intent.” *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). The FMIA preempts state “[1] [r]equirements [2] within the scope of [the FMIA] [3] with respect to premises, facilities and operations of any establishment at which inspection is provided under [the FMIA], [4] which are in addition to, or different than those made under [the FMIA].” 21 U.S.C. 678. The provisions of Section 599f challenged here satisfy each of those conditions.

a. “Requirements”

i. Section 599f sets forth “requirements” in the ordinary sense of the word. As explained in detail below, most of the challenged provisions of Section 599f—the bans on “receiv[ing]” and “hold[ing]” nonambulatory swine, and on “process[ing]” and “butcher[ing]” their meat—are direct regulations of slaughterhouse activities committed to exclusive federal control under 21 U.S.C. 678.

ii. Whether Section 599f(b)’s ban on “sell[ing] meat or products of nonambulatory animals for human consumption” is a “requirement” with respect to slaughterhouse activities under 21 U.S.C. 678 calls for further analysis.

The FMIA does not in general expressly preempt state regulation of the commercial sales activities of slaughterhouses. That said, it does preempt “[m]arking, labeling, packaging, [and] ingredient requirements.” 21 U.S.C. 678; see *Jones v. Rath Packing Co.*, 430 U.S. 519, 528-532 (1977) (interpreting the second sentence of 21 U.S.C. 678). And to some extent the FMIA preempts state judgments about what finished meat and meat products are fit for commerce and human consumption, in that the FMIA defines certain conditions that render such products “adulterated” (21 U.S.C. 601(m)), bans commerce in adulterated products (21 U.S.C. 610(c)(1)), and authorizes concurrent state enforcement on that subject only when “consistent with requirements under [the FMIA]” (21 U.S.C. 678). Section 599f(b)’s sale ban could reasonably be characterized as an impermissible effort to add a class of adulteration unrecognized in federal law.

But in the context of Section 599f’s other provisions, the sale ban is better understood as an adjunct to Cali-

fornia’s immediate euthanasia requirement. Textually, the sale ban is part of a single provision that also bans “process[ing]” and “butcher[ing].” Cal. Penal Code § 599f(b) (West 2010). That provision is calculated to enforce Section 599f’s immediate-euthanasia requirements (*id.* § 599f(c) and (d)) by depriving slaughterhouses of a market for products produced in violation of those requirements. As the sponsor of the 2008 amendment explained, the revised Section 599f “will create an economic disincentive to [certain slaughterhouse] practices [regarding nonambulatory animals] by prohibiting the sale of any meat or products from such animals.” C.A. App. 289.

Moreover, as a practical matter, permitting California to enforce its preferred slaughterhouse practices through 599f(b)’s sale ban would undermine Congress’s preemptive objective in 21 U.S.C. 678. If this sale ban escapes express preemption, then nearly any state slaughterhouse regulation might similarly escape the FMIA’s preemption provision through the expedient of recharacterizing the regulation as a ban on downstream sales of products produced in a manner disapproved by the State. This Court, however, has refused to distinguish between two substantively identical requirements enforced by state regulations applied at different stages of the production and marketing of a federally regulated product, because “treating [such] restrictions differently for pre-emption purposes would make no sense.” *Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004).

The question presented in *Engine Manufacturers* was whether a federal statute preempting “any standard relating to the control of emissions from new motor vehicles” applied to a California rule prohibiting vehicle fleet

operators from purchasing or leasing vehicles that did not comply with stringent emissions requirements. 541 U.S. at 248-249, 252 (quoting 42 U.S.C. 7543(a)). California argued that its regulation of vehicle *purchases* was not preempted because (in its view) the federal statute reached only a “*production* mandate that requires *manufacturers*” to comply with certain standards. *Id.* at 253 (citation and brackets omitted). This Court rejected that distinction because it “confuse[d] standards with the means of enforcing standards,” *ibid.*, and as a practical matter, “[t]he manufacturer’s right to sell federally approved vehicles is meaningless in the absence of a purchaser’s right to buy them,” *id.* at 255.<sup>4</sup> Likewise here, the sale ban is simply one means (among many in Section 599f) to enforce the requirements California would impose on the handling of nonambulatory animals. The FMIA’s goal of uniform federal requirements for handling and inspecting livestock at slaughterhouses would be meaningless if a State could insist that meat is unsalable unless it was produced in conformity with the State’s own preferred requirements. Thus, like the other challenged provisions of Section 599f, the sale ban is a requirement about how slaughterhouses must handle nonambulatory animals.

This Court’s precedents giving expansive reach to the word “requirement” in express preemption provisions confirm that understanding. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), interpreted an express preemption clause providing that “[n]o requirement or prohibition based on smoking and health shall be im-

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<sup>4</sup> Although the statute at issue in *Engine Manufacturers* referred to “standards” while 21 U.S.C. 678 refers to “requirements,” this Court has used precedents construing one to inform the other. See, e.g., *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1135 (2011).

posed under State law with respect to [certain aspects of cigarette promotion].” *Id.* at 515. The *Cipollone* plurality found that provision to “sweep[] broadly,” and emphasized that it embraced common-law damage actions because “regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.” *Id.* at 521 (citation omitted); accord *id.* at 548-549 (opinion of Scalia, J.). Majorities of the Court have repeatedly reaffirmed this principle in construing other express preemption provisions referring to “requirements.” See *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-324 (2008); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 510-511 (1996) (opinion of O’Connor, J.); *id.* at 504 (opinion of Breyer, J.).

*Cipollone*, like *Engine Manufacturers*, thus recognizes that a State may impose a requirement by applying economic pressure to a commercial transaction. Accordingly, where federal supremacy is concerned, a state law that exerts clear and focused economic pressure on the conduct of a federally regulated activity is no less a “requirement” with respect to that activity than a direct prescriptive regulation would be. That principle logically applies whether the state law is enforced through a criminal prohibition (as here) or a cause of action in tort (as in *Cipollone*). Indeed, as an economic matter, the outright ban on sales here may be more potent than the contingent damages liability at issue in *Cipollone*. See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 446 (2005) (contrasting the “pressure caused by a State’s power to impose sales and use restrictions” with the “more attenuated pressure exerted

by common-law suits”). Thus, the sale ban in Section 599f(b) is for all practical purposes a requirement about how nonambulatory animals are to be handled by a slaughterhouse.<sup>5</sup>

*b. “Within the scope of [the FMIA]”*

The challenged provisions of Section 599f are “within the scope” of the FMIA. The FMIA and USDA’s regulations apply to both activities conducted at a slaughterhouse’s permanent physical plant and activities involving delivery vehicles once they have entered the slaughterhouse’s premises. See, *e.g.*, FSIS Directive 6900.2, at 6 (Pet. Br. App. 114-115) (discussing inspection authority over vehicles); 21 U.S.C. 606(a) (Supp. II 2008) (conferring authority over “every part of [the] establishment” where “meat food products [are] prepared for commerce”). Thus, for the entire time the animal is within the slaughterhouse’s premises, the animal and its products are within the physical scope of the FMIA’s application.

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<sup>5</sup> Even if the sale ban in Section 599f(b) is not properly regarded as a “requirement[]” preempted by 21 U.S.C. 678, the effect such a ban would have on the preempted subject matters described in 21 U.S.C. 678 would likely lead to the conclusion that the ban is preempted under conflict preemption principles, because it would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), in implementing uniform practices for humane handling, inspection, and slaughter of animals to produce meat for human consumption. In that analysis, the savings clause in 21 U.S.C. 678 would not protect Section 599f(b) because the savings clause authorizes only state laws “consistent with [the FMIA]” and “does *not* bar the ordinary working of conflict pre-emption principles,” *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000). Petitioner does not, however, ask this Court to decide any issue of conflict preemption. See Pet. i-ii.

Furthermore, each stage of slaughterhouse operations at which Section 599f might apply is within USDA’s expansive regulatory authority under the FMIA:

- USDA regulates the humane handling of swine—whether nonambulatory disabled, nonambulatory but not disabled, or otherwise—upon the animals’ arrival at the slaughterhouse, even before the animals are identified to FSIS for inspection. See, *e.g.*, 44 Fed. Reg. 68,813 (1979) (promulgating 9 C.F.R. 313.1-.2, regulating humane handling); see also FSIS Directive 6100.1 (Part VIII.A.1) (Pet. Br. App. 47) (“All animals that are on the premises of the establishment, on vehicles that are on the premises, or animals being handled in connection with slaughter (e.g., livestock on trucks being staged for slaughter) are to be handled humanely.”).<sup>6</sup>

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<sup>6</sup> The fact that USDA’s Part 313 humane-handling regulations reflect a policy originally enacted by Congress in a law separate from the FMIA does not place those regulations outside “the scope of [the FMIA],” 21 U.S.C. 678. Congress itself announced in the HMSA 1978 that it was “amend[ing] the [FMIA] to *require* that meat inspected and approved *under such Act* be produced” in accordance with the policy in the HMSA. Pmbl., 92 Stat. 1069 (emphasis added). And USDA understood in promulgating the Part 313 humane-handling regulations that it was “amend[ing] the Federal meat inspection regulations to implement Pub. L. 95-445,” *i.e.*, the HMSA 1978, which amended the FMIA. 44 Fed. Reg. at 68,809.

Moreover, even if the HMSA 1978 did not bring the preexisting HMSA within the scope of the FMIA, that would not vindicate respondents’ position. The question for preemption purposes is whether the handling of nonambulatory animals in connection with slaughter is within the scope of the FMIA, not whether that subject is also within the scope of some other federal law. Because a nonambulatory animal’s

- The ante-mortem inspection of nonambulatory swine presented to FSIS for inspection is subject to longstanding regulations under the FMIA. See, *e.g.*, 35 Fed. Reg. 15,554 (1970) (promulgating Part 309 ante-mortem inspection regulations and Part 311 disposition regulations on the authority of, *inter alia*, the FMIA).
- The processing and butchering of carcasses into meat and meat food products is regulated under the FMIA. See, *e.g.*, 35 Fed. Reg. at 15,554 (promulgating Part 318 processing regulations on the authority of, *inter alia*, the FMIA).

Accordingly, the provisions of Section 599f addressing the same subjects are also within the scope of the FMIA. Indeed, the challenged provisions of Section 599f would be within the scope of the FMIA even in the absence of those federal regulations. That USDA has in fact used the FMIA to regulate matters addressed by the challenged provisions of Section 599f only underscores the intrusiveness of California’s law and the need to confirm federal supremacy over the areas described by the FMIA’s express preemption provision.<sup>7</sup>

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condition may signal disease, the handling of such an animal in connection with ante-mortem inspection is within the scope of the FMIA. For example, USDA undoubtedly could require—irrespective of humane-handling considerations—that nonambulatory animals be held for examination and disposition by a veterinarian.

<sup>7</sup> Petitioner states that slaughterhouses generally purchase swine once they are on the slaughterhouse premises. Pet. Br. 46 n.18. Assuming that is correct, Section 599f(a)’s ban on “buy[ing]” nonambulatory swine is functionally no different from—and preempted for the same reasons as—Section 599(a)’s ban on “receiv[ing]” such swine and Section 599f(c)’s ban on “hold[ing]” such swine.

c. “With respect to \* \* \* operations”

The challenged provisions of Section 599f address slaughterhouse “operations.” The FMIA contains two preemption provisions and a savings clause in 21 U.S.C. 678, which divide the Act’s concerns into several subject matters: “premises, facilities and operations”; “record-keeping”; “[m]arking, labeling, packaging, [and] ingredient requirements”; and “other matters.” In that context, the “operations” of a slaughterhouse are best understood as “action[s] done as a part of practical work or involving practical application of a \* \* \* process” at the slaughterhouse. *Webster’s New International Dictionary* 1707 (2d ed. 1958). Consistent with that definition, 21 U.S.C. 623(a)—which exempts personal and custom slaughtering from FMIA regulation—uses the term “operations” to refer to “the slaughter of animals and the preparation of the carcasses, parts thereof, meat and meat food products.”

Section 599f imposes requirements “with respect to” slaughterhouse “operations” just as the FMIA’s humane-handling and inspection provisions do. Both federal and California law address practical aspects of how animals must be handled by the slaughterhouse in connection with slaughter, and the conditions under which processing of the carcasses into meat and meat food products must occur.

Consequently, the FMIA’s savings clause does not rescue Section 599f. It permits States to “mak[e] requirement[s] or tak[e] other action, consistent with [the FMIA], with respect to any *other* matters regulated under [the FMIA].” 21 U.S.C. 678 (emphasis added). Because Section 599f seeks to regulate slaughterhouse “operations” properly “within the scope of [the FMIA],”

it cannot be said to regulate the “other matters” governed by the savings clause. *Ibid.*

d. “*In addition to, or different than*”

Section 599f’s requirements regarding nonambulatory swine are not the same as those prescribed under the FMIA. Federal regulations do not prohibit the receipt or holding of nonambulatory swine; to the contrary, they contemplate that such animals will be received, and they address how animals will be humanely handled and held. See 9 C.F.R. 309.2(b) (governing nonambulatory disabled livestock); FSIS Directive 6900.2, at 14-15 (Pet. Br. App. 125-127) (same); 9 C.F.R. 313.2(a)-(c) (governing driving of livestock). Likewise, there is no flat prohibition in USDA regulations on processing the meat of nonambulatory swine for sale; instead, the FMIA provides a system of ante-mortem and post-mortem inspections designed to pass carcasses of nonambulatory swine for human consumption in whole or in part if appropriate. See 9 C.F.R. 309.2(n); 9 C.F.R. Pt. 311; see also *Rath Packing*, 430 U.S. at 530-532 (applying the “in addition to, or different than” language in the second sentence of 21 U.S.C. 678).

By generally permitting state-law requirements that parallel federal requirements—those that are not “in addition to, or different than” the federal requirements—21 U.S.C. 678 reflects a determination not to exclude States entirely from the field of slaughterhouse regulation. The FMIA is not unique in this respect. For example, in *Bates*, the Court adopted a “parallel requirements” reading of a preemption provision that “prohibit[ed] only state-law \* \* \* requirements that are ‘*in addition to or different from*’ the \* \* \* requirements under [federal law].” 544 U.S. at 447. Under that

interpretation, “a state-law \* \* \* requirement is not pre-empted \* \* \* if it is equivalent to, and fully consistent with, [the federal law’s] provisions.” *Ibid.*; see also *Lohr*, 518 U.S. at 513 (opinion of O’Connor, J.) (“[State law] claims are not pre-empted by [a statute reaching requirements ‘different from, or in addition to’ federal requirements] to the extent that they seek damages for \* \* \* violation of federal requirements.”).

This parallel-requirements interpretation does not save Section 599f, but it may save other state laws. Respondents were thus mistaken in arguing to the court of appeals that if the challenged provisions of Section 599f are preempted, then the FMIA would also forbid prosecuting the operator of a federally inspected slaughterhouse under state laws prohibiting cruelty to animals. See, *e.g.*, Non-State Resp’t C.A. Reply Br. 22-24. To the contrary, to the extent such state laws are applied to conduct that violates the FMIA or FSIS regulations, they are “consistent with [the FMIA]” and do not impose “[r]equirements \* \* \* in addition to, or different than those made under [the FMIA],” 21 U.S.C. 678, and therefore are not expressly preempted. By contrast, respondents have not suggested how the challenged provisions of Section 599f could be similarly limited in their application.

**2. *The court of appeals’ reasons for upholding Section 599f are unpersuasive***

The Ninth Circuit concluded that 21 U.S.C. 678 does not preempt the challenged provisions of Section 599f because the California law regulates “the kind of animal that may be slaughtered,” and the FMIA “doesn’t preclude states from banning the slaughter of certain kinds of animals altogether.” Pet. App. 9a. That reasoning is

mistaken because it draws an irrelevant distinction and fails to respect 21 U.S.C. 678's focus on "requirements."

Even if Section 599f can be described as regulating a "kind of animal," the law operates by regulating slaughterhouse operations within the FMIA's scope. It is therefore expressly preempted. The court of appeals, however, suggested something more was necessary for preemption: The court acknowledged that "[i]t is possible that a state may go too far in regulating what 'kind of animal' may be slaughtered," Pet. App. 10a, and it volunteered hypothetical examples of impermissible "kind of animal" regulations that "could effectively establish a parallel state meat-inspection system," *id.* at 11a. But the court offered no statutory basis for its view that only some "kind of animal" regulations would be preempted, and it refused to articulate any principle for discerning which regulations "go too far." *Id.* at 10a-11a. Those analytical gaps reveal that characterizing a state law as regulating what "kind of animal" may be slaughtered is fundamentally unhelpful in deciding whether the FMIA preempts the law.

The court of appeals' "kind of animal" construct was borrowed from *Cavel International, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007), cert. denied, 554 U.S. 902 (2008), and *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326 (5th Cir.), cert. denied, 550 U.S. 957 (2007), which both upheld state prohibitions on the slaughter of horses for human consumption. See Pet. App. 9a (explaining the state laws at issue governed only "what types of meat may be sold for human consumption in the first place") (quoting *Empacadora*, 476 F.3d at 333).

Assuming, *arguendo*, that *Cavel* and *Empacadora* were correctly decided, it is not because horses are a

“kind of animal,” but rather because the bans at issue did not require anything different from federal law with respect to slaughterhouse operations within the FMIA’s scope. Most obviously, the quality of being a horse is immutable and known to all involved well before the animal is within the physical or regulatory reach of the FMIA. Cf. Pet. App. 39a (“A pig is a pig. A pig that is laying down is a pig.”). By contrast, immobility is a mutable characteristic that may change even while the animal is on the premises of a federally regulated slaughterhouse. For example, the record below shows that swine that are nonambulatory upon arrival at a slaughterhouse often suffer only from fatigue and stress and are able to stand and walk after rest and monitoring. See J.A. 15 (Terrill Decl. ¶ 5). Conversely, USDA regulations governing the good repair of slaughterhouse facilities illustrate that disabling injury to an animal’s limbs on slaughterhouse premises is not unknown. See 9 C.F.R. 313.1. The Ninth Circuit’s decision allowing California to regulate slaughterhouse operations based on a characteristic that can and does appear and disappear after an animal is already on a slaughterhouse’s premises cannot be squared with the FMIA’s prohibition of such state-law requirements.

**B. Express Preemption Under The FMIA Serves Important Policy Interests**

The FMIA’s express preemption provision is an important component of federal policy.

*1. Express preemption under the Federal Meat Inspection Act is a key part of the balance Congress has struck between federal and state regulation of slaughterhouses*

As described above (pp. 7-9, *supra*), the FMIA creates a largely—but not exclusively—federal system for the regulation of slaughterhouses. Meat production and distribution is a largely interstate activity. As Congress found:

[T]he major portion [of meat and meat food products] moves in interstate or foreign commerce. \* \* \* Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers.

21 U.S.C. 602. Thus, achieving the FMIA’s purposes requires a regulatory regime for slaughterhouses that is generally uniform and unencumbered by state-to-state variations.

Reflecting a balance of interests, however, the FMIA does not demand national uniformity in every aspect of slaughterhouse regulation. For example, the savings clause in 21 U.S.C. 678 provides that the States retain

authority over “other matters” not addressed in the express preemption clauses, so long as their laws are “consistent with” the FMIA. The FMIA also authorizes cooperative federal-state implementation of state meat-inspection regimes for slaughterhouses producing meat only for intrastate consumption. See 21 U.S.C. 661(a). The findings above, the express preemption provision, the savings clause, and the intrastate inspection framework were all added to the FMIA together in 1967, see WMA §§ 2, 15, 16, 81 Stat. 587, 595, 600, and together they reflect the particular balance Congress struck in this area.

Accordingly, if a State is concerned only about meat inspection at intrastate slaughterhouses, it may seek FSIS approval of an intrastate inspection regime. Twenty-seven States have done so; California is not among them. See FSIS, *List of Participating States*, [http://www.fsis.usda.gov/regulations\\_&\\_policies/Listing\\_of\\_Participating\\_States/index.asp](http://www.fsis.usda.gov/regulations_&_policies/Listing_of_Participating_States/index.asp) (Aug. 13, 2007). Alternatively, any interested person (including a State) may petition USDA to revise its FMIA inspection regulations (or to use authorities other than the FMIA to regulate slaughterhouse operations). See 9 C.F.R. Pt. 392. USDA has been quite active on matters concerning nonambulatory animals: Through a series of measures in 2004, 2007, and 2009, USDA has required the condemnation of nonambulatory disabled full-grown cattle. See note 1, *supra*. And USDA recently solicited comment on two rulemaking petitions to extend that cattle rule to veal calves, or—of relevance to petitioner’s members

who operate swine slaughterhouses—to all livestock. 76 Fed. Reg. 6572 (2011).<sup>8</sup>

What a State may not do is engraft its preferred additions onto the federal regime. Yet that is precisely the aim and effect of Section 599f. As the sponsor of the 2008 amendment to Section 599f explained, the amendment was necessary in his view because under “the USDA inspection system, there is \* \* \* no adequate system in place to prevent [nonambulatory disabled] animals from continuing to enter our food supply.” J.A. 58. The FMIA’s preemption provision is intended to preclude such disuniformity in the operations of slaughterhouses serving the interstate market.

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<sup>8</sup> FSIS’s action on the rulemaking petition addressed to all livestock could affect some of the issues in this case. That petition asks for a rule that nonambulatory disabled animals “be condemned and humanely euthanized in accordance with 9 C.F.R. § 309.13.” Farm Sanctuary, *Petition to Amend 9 C.F.R. § 309.3(e)* 2, [http://www.fsis.usda.gov/PDF/Petition\\_Humane\\_Handling.pdf](http://www.fsis.usda.gov/PDF/Petition_Humane_Handling.pdf) (Mar. 15, 2010). On the one hand, if FSIS adopts the rule of condemnation that Farm Sanctuary seeks, then Section 599f(b) would likely not be expressly preempted in full because its prohibition on “process[ing], butcher[ing], or sell[ing] meat or products of nonambulatory animals” would—in its application to nonambulatory *disabled* animals—parallel FSIS’s regulations prohibiting the slaughter or processing of condemned animals for human food, see 9 C.F.R. 309.13, Pt. 314. On the other hand, Section 599f(c) would still be “in addition to, or different than” USDA’s regulations because that provision of state law flatly requires “immediate action to humanely euthanize the animal” while Farm Sanctuary seeks to apply USDA’s orderly inspection and condemnation procedures to such animals.

**2. *Express preemption under the Federal Meat Inspection Act protects federal inspectors and helps protect the interstate meat production system***

The FMIA’s express preemption provision protects the FMIA’s uniform scheme of inspections and humane-handling requirements from modification by state law. Where Section 599f is concerned, that protection serves at least two tangible federal interests: first, detecting diseases that threaten the meat supply, and second, protecting federal inspectors in the discharge of their duties.

a. The federal regulation of slaughterhouses is designed in part to ensure the safety of particular carcasses for human consumption, and in part to implement a uniform federal policy regarding the humane handling of livestock. But it also serves to detect serious diseases—such as foot-and-mouth disease—that may be spreading through livestock populations, threatening widespread economic harm and disruption of the meat supply.

FSIS follows an established protocol for handling such diseases. See generally FSIS Directive 6000.1 (rev. 1, Aug. 3, 2006) (Pet. Br. App. 34-43). As that Directive explains, “[o]utbreaks of certain animal diseases \* \* \* can cause considerable economic and social disruption,” “including disruption of livestock marketing and trade,” and require “animal quarantine, depopulation, the cleaning and disinfecting of livestock environments, and the mass disposal of animal carcasses.” *Id.* (Part V) (Pet. Br. App. 35). Reports of such diseases are transmitted to state authorities or to USDA’s Animal and Plant Health Inspection Service. *Id.* (Part VII) (Pet. Br. App. 38-40). Those authorities will in turn trace the condition back to the farm and work to contain the spread of dis-

ease. Certain diseases also call for the United States to notify an intergovernmental entity, the World Organisation for Animal Health. See *id.* (Part V) (Pet. Br. App. 36).

That system of reporting and response relies heavily on ante-mortem inspections. Such inspections are often the best way to detect serious diseases, especially when standard diagnosis requires observing or taking the temperature of a live animal. See FSIS Directive 6000.1 (Part VI.C) (Pet. Br. App. 37-38) (listing “[a]ntemortem conditions that do not fit with the typical conditions for a specific domestic disease”); see also American Ass’n of Swine Veterinarians Pet. Stage Amicus Br. 4-11. For example, as FSIS’s training materials for public health veterinarians explain, the initial clinical symptoms of foot-and-mouth disease for swine are “fever \* \* \* , anorexia, reluctance to move, and squeal[ing] when forced to move,” followed by vesicle (blister) formation. FSIS, *Disposition/Food Safety: Reportable and Foreign Animal Diseases* 66 (Jan. 29, 2009). Of those symptoms, only vesicles would be detectable post mortem, and would not be visible at all on a skinned and dressed carcass. Ante-mortem inspection is similarly important in detecting, for example, swine vesicular disease (*id.* at 72-73), vesicular stomatitis (*id.* at 57); and classical swine fever or “hog cholera” (*id.* at 76-77).

Section 599f would undermine that system for detecting and responding to serious diseases in livestock. By requiring immediate euthanasia, Section 599f would make it difficult for FSIS veterinarians to recognize a number of serious diseases, let alone report them to authorities that can act to contain an outbreak. Section 599f is particularly counterproductive in that it requires immediate euthanasia of the animals in which the dis-

ease has likely progressed the furthest, and which are thus the bellwethers of contagion in the herd. The FMIA's express preemption provision allows FSIS inspectors to recognize those serious diseases, unencumbered by state restrictions.

b. The FMIA's express preemption provision also protects FSIS inspectors. The FMIA goes beyond the federal regulatory schemes at issue in *Cipollone*, *Lohr*, *Bates*, and *Engine Manufacturers* in a notable respect: In addition to establishing requirements that regulate the conduct of private entities (as those other federal schemes do), the FMIA's inspection program locates federal personnel at the regulated facilities to implement the federal program. As a result, in marking the limits of state authority, 21 U.S.C. 678 not only protects the integrity of the federal regulatory scheme, but also insulates the federal inspectors who implement that scheme from state interference. Unwarranted intrusion by state law could hamstring FSIS inspectors in the discharge of their duties.

The challenged provisions of Section 599f illustrate how problematic such intrusion could be. The California law requires immediate euthanasia, apparently without regard to federal inspection requirements. Competing efforts by FSIS inspectors to maintain the federal inspection regime and by state officials to enforce Section 599f's requirements could put those two groups at loggerheads over basic matters of slaughterhouse operations: What does it take to deem an animal "nonambulatory" under Section 599f(c)? Must a professional veterinarian make that determination? How quickly must ante-mortem inspection take place so that an animal believed to be nonambulatory may be "immediate[ly] \* \* \* euthanize[d]" under Section 599f(c)? What if no

federal inspector is immediately available? Must federal inspectors reorganize their inspection priorities to accommodate the urgency Section 599f appears to place on euthanasia? What if an animal becomes nonambulatory as it passes from the holding pens into the slaughter line?

Similar disputes could arise over humane handling. For example, a federal inspector could conclude that nonambulatory swine that are not disabled, but merely tired and overheated, would best be handled by revival with food, water, and shade. But Section 599f would seem to require immediate euthanasia, even if that more drastic (and economically wasteful) approach was unnecessary.

We assume California's prosecutors would exercise suitable discretion in enforcing Section 599f, but the decision below implies that FSIS inspectors themselves could in principle be criminally charged for their involvement. See Cal. Penal Code § 31 (West 1999) (treating persons who "aid and abet [a crime's] commission, or, not being present, have advised and encouraged its commission" as principals in the crime). Some of those disagreements might in principle be arbitrated through case-by-case application of conflict preemption principles. But the FMIA's express preemption provision is designed to avoid such confrontations altogether by categorically marking the limits of state authority. Thus, by preempting the challenged provisions of Section 599f in full, 21 U.S.C. 678 both insulates federal inspectors from state-law intrusion and protects the integrity of the FMIA's requirements.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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