

No. 10-224

In The
Supreme Court of the United States

—◆—
NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, ET AL.,

Respondents.

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

—◆—
**BRIEF OF *AMICUS CURIAE*
AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO ANIMALS
IN SUPPORT OF RESPONDENTS**

—◆—
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INTEREST OF *AMICUS CURIAE*¹

The American Society for the Prevention of Cruelty to Animals (“ASPCA”) submits this brief as *amicus curiae* in support of Respondents. As the oldest humane organization in North America, the ASPCA has played a unique role in the history of animal protection. Incorporated in 1866 by a special act of the New York State legislature, the ASPCA was the first humane organization to be granted law enforcement authority to investigate and make arrests for animal cruelty and other crimes committed against animals. A privately funded not-for-profit corporation with over two million supporters nationwide, the ASPCA’s mission remains “to provide effective means for the prevention of cruelty to animals throughout the United States.” To carry out its mission, the ASPCA enforces the New York State animal cruelty laws in the five boroughs of New York City, supports the investigation and prosecution of crimes against animals nationwide, advocates for animal welfare laws in states across the country, and educates law enforcement, prosecutors, veterinarians and the judiciary on proper responses to crimes against animals in their communities. The ASPCA offers this brief to assist the Court in its appreciation of the long legacy of state

¹ Pursuant to Supreme Court Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the brief’s preparation or submission. The National Meat Association and all Respondents have consented to the filing of this brief after receiving timely notice from *amicus curiae*.

regulation of the treatment of animals in America, the support for that treatment and the role that California Penal Code Section 599f plays in that scheme.



SUMMARY OF ARGUMENT

The Ninth Circuit was correct in concluding that Section 599f of the California Penal Code is not preempted by the Federal Meat Inspection Act (“FMIA”) since it does not regulate the “premises, facilities and operations” of slaughterhouses within the “scope” of the FMIA, but rather merely carries out a moral judgment about the kinds of animals that can be slaughtered for human consumption in the state of California. Put into proper context, by removing nonambulatory animals from the slaughter process altogether, Section 599f does what state animal cruelty laws have been doing for more than a century – implementing the states’ inherent police power to decide which behaviors threaten public health, safety and morals such that treating them as criminal offenses is warranted. By preventing the well documented and grossly inhumane handling of animals that are too sick or disabled to stand and walk to their deaths, Section 599f is an integral element of California’s anti-cruelty penal scheme, which like other state anti-cruelty laws, has expanded to better reflect evolving community sensibilities and to adapt to a growing social and scientific awareness of animals’ capacity for pain and suffering.

While the provisions of the FMIA are no doubt applicable to animals that can be legally slaughtered and sold for human consumption in California, Section 599f functions by removing nonambulatory animals from those animals covered by the federal law. Therefore, as further explained herein and in Respondents' briefs, the Ninth Circuit's decision to reverse the District Court's ruling and to vacate the preliminary injunction is correct and should be affirmed.



ARGUMENT

I. STATE ANTI-CRUELTY LAWS ARE A LONG STANDING, LEGITIMATE EXERCISE OF THE STATES' INHERENT POLICE POWER

California Penal Code Section 599f is part of a statewide anti-cruelty law that protects animals from inhumane treatment by delineating acts that are prohibited and ascribing penalties for transgressions. Like California, states across the country have their own animal cruelty provisions also grounded in the traditional police power exercised in the interest of safeguarding the health, safety and morals of their citizens. Every state has exercised that power to enact varied and often extensive statutory penal law schemes requiring humane care and treatment of animals, prohibiting abuse, and preventing circumstances where cruelty could occur.

When called upon to review state anti-cruelty statutes, the courts have consistently held that laws

preventing cruel and inhumane treatment of animals fall squarely within the state’s inherent police power. For more than 100 years, across an eclectic landscape of state anti-cruelty provisions covering virtually every animal species, the courts have reaffirmed this basic principle.

Early decisions affirmed the legitimacy of state anti-cruelty laws based in part on the state’s inherent police power to enact laws to protect the property of its citizens.² Yet even these early cases articulated a broader moral imperative justifying state laws regarding animal welfare – that permitting the needless suffering of living beings offends the morals of civilized society and should therefore not be tolerated.

Whether upholding a conviction for being a spectator at a cockfight³, trapping a fox in an inhumane manner,⁴ shooting birds for entertainment,⁵ conducting a “bloodless bullfight,”⁶ beating a horse⁷ or abusing a

² See, e.g., *People v. Davis*, 72 N.J.L. 345, 352 (N.J. Sup. Ct. 1905) (“The act challenged in this case seems to us to be entirely within the police power of the legislature, over this class of property, in its right of restriction in the manner and purpose of its destruction.”).

³ *Commonwealth v. Hart*, 42 Pa. D. & C. 3d 180, 185 (1986).

⁴ *Commonwealth v. Higgins*, 178 N.E. 536, 538 (Mass. Sup. Jud. Ct., Worcester 1931).

⁵ *Davis*, 72 N.J.L. at 352.

⁶ *C.E. Am., Inc. v. Antinori*, 210 So.2d 443, 443 (Fla. 1968)

⁷ *Beamer v. Ohio*, 12 Ohio Cir. Dec. 4 (Ohio Cir. Ct. 1901).

dog,⁸ the courts have sounded a recurring theme, that “public sentiment sustains [cruelty laws] as being no more than a proper exercise of the police power,” *Goodwin v. Touhey*, 71 Conn. 262, 268 (Conn. 1898), and that the anti-cruelty “offense is against the public morals, which the commission of cruel and barbaric acts tend to corrupt. . . . It is directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those act[s].” *Higgins*, 178 N.E. at 538. *See also Antinori*, 210 So.2d at 444 (“[I]t is now generally well recognized that legislation that has for its purpose the protection of animals from harassment and ill treatment is a valid exercise of the police power.”).

The state’s power to protect animals from cruel treatment is in fact superior to the right of an animal owner to dispose of his property as he sees fit when his action runs counter to humane considerations which state law has chosen to regulate. For example, a conviction for conducting target practice on birds owned by a defendant was upheld because the defendant’s property rights were not infringed by a law banning the shooting of birds purely for entertainment, when such behavior conflicted with prevailing social norms.

⁸ *People v. Bunt*, 118 Misc. 2d 904, 910 (N.Y. J. Ct. 1983) (New York anti-cruelty law constitutional as “reasonable extension of the state’s police powers”).

No man may torture his animal property, even if he ha[s] the right to kill it. Nor may he use it, in the killing, as a means of amusement or pleasure to himself or others. That he may kill animals which he may own and which he may use as food is conceded, but in the interest of the humane destruction of such animal life the legislature, under the police power, has the power to specify in what manner such killing may not be done. This does not deprive him of any property right. It simply defines the mode in which he may exercise the right.

To take life, or to torture for the enjoyment of the torturer, has never been considered among civilized people as an absolute right in the owner of property having life.

Davis, 72 N.J.L. at 352.

The courts have reaffirmed the states' right to decide how animals in their jurisdictions should be treated even when those animals are wildlife considered at times to be of the "nuisance" variety. In upholding a conviction for trapping a fox in a manner that would cause the animal prolonged pain and suffering, a Massachusetts court noted that:

[T]he statute in question was intended to be in the interest of the public morals. . . . The capture of a wild animal contrary to the provisions of this statute undeniably must cause injury to the part of the body caught in the

trap, with attendant pain. It falls within the general category of cruel treatment.

Higgins, 178 N.E. at 538.

The *Higgins* court held that while the defendant farmer had the right to protect his property, this consideration did not override the legislative intent to protect animals from cruel treatment and that the defendant “must yield his views of what is reasonable for that purpose to the judgment of the moral standard of the community as embodied in a statute.” *Id.*

As state anti-cruelty laws have evolved to meet changing community standards, the courts have kept pace by affirming that these expanded statutory protections are valid exercises of the police power. In upholding a conviction for aiding or encouraging a cockfight by attending as a spectator, one court observed that while cockfighting may have been socially acceptable at one point in history, the activity is now considered barbaric and runs counter to prevailing societal norms. Therefore, laws outlawing cockfighting are valid exercises of the state authority.

It is elementary that the governing authority in the exercise of its police power has both the prerogative and the responsibility of enacting laws which will promote and conserve the health, safety, morals and general welfare of society.

Over the centuries the disposition to look upon such brutalities with favor or approval has gradually lessened, and compassion and

concern for man's fellow creatures of the earth has increased to the extent that it is now quite generally thought that the witnessing of animals fighting, injuring and perhaps killing one another is a cruel and barbarous practice, discordant to human's better instincts and so offensive to his finer sensibilities that it is demeaning to morals.

* * *

[L]egislation against such practices as the fighting of animals is [therefore] justified for the purpose of regulating morals and promoting the good order and general welfare of society.

Hart, 42 Pa. D. & C. 3d at 183 (1986).

II. STATE ANTI-CRUELTY LAWS HAVE EXPANDED THEIR COVERAGE TO MEET CHANGING ANIMAL WELFARE NEEDS AND TO KEEP PACE WITH COMMUNITY STANDARDS AND MORALS

With firm grounding as a legitimate expression of the states' inherent police power, American laws criminalizing cruelty to animals have grown and thrived within their respective state penal law schemes and evolved to meet changing community morals regarding acceptable treatment of animals.

While state anti-cruelty laws may have originated as a means of safeguarding property rights, they now share a unifying underlying principle – that non

human animals are living beings that experience pain and suffering and therefore are worthy of protection under the law, independent of their legal status as property.

Today, animal cruelty is a crime in every state and a felony in forty-seven. Only Idaho, North Dakota and South Dakota are without any form of felony anti-cruelty provision. State laws differ as to the type of behavior that is criminalized (*e.g.*, neglect, affirmative abuse), the species or category of animal protected (companions/pets, farm animals, wildlife) and the attendant penalties for violations. Notably, most state anti-cruelty laws – at least on the misdemeanor level – protect a wide variety of animals including pets, livestock, wild animals and fish.⁹

The anti-cruelty laws typically apply to acts that cause unjustified suffering, injury or death, including behaviors like kicking, beating, shooting, stabbing and killing. Animal neglect, including the failure to provide adequate food, water, shelter and necessary

⁹ Many state misdemeanor anti-cruelty laws apply to “any animal” and define that term broadly. New York defines “any animal” as “every living creature except a human being.” N.Y. Agric. & Mkts., Art. 26, § 350). *See also*, Cal. Penal Code § 599b (“animal” includes “every dumb creature”); Fla. Stat. Ann. § 828.02 (“every living dumb creature”); Me. Rev. Stat. Ann., tit. § 3907 (“Animal means every living, sentient creature not a human being.”); 510 Ill. Comp. Stat. 70/2.01 (“every living creature domestic or wild, but does not include man”); N.J. Stat. Ann. § 4:22-17 (“living animal or creature”).

veterinary care to an animal in one's care or custody, is also usually a crime in state anti-cruelty schemes.¹⁰

Over time, anti-cruelty laws have changed and expanded to reflect shifting community values, evolving science, and evidence establishing a strong connection between animal cruelty and violent crime against human victims.¹¹

In order to incorporate these changes in public sentiment and morals, states have amended their cruelty laws to prohibit behaviors previously deemed socially acceptable, to increase penalties for the more serious forms of abuse, and to authorize sentencing options that afford court-enforced protection to potential victims of abuse (both human and animal).¹²

¹⁰ See generally, Leslie Sinclair *et al.*, *Forensic Investigation of Animal Cruelty, A Guide for Veterinary and Law Enforcement Professionals*, 1-5 (2006); Bruce A. Wagman *et al.*, *Animal Law, Cases and Materials*, 90-99 (2010).

¹¹ Studies conducted over the past twenty years by prominent psychologists and other experts have established a link between abuse to animals and humans by perpetrators of violence, and have been able to identify children's early involvement with animal abuse as an indicator of future violence directed at human and animal victims. *See, e.g.*, Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 *ANIMAL LAW* 81 (1999); *Cruelty to Animals and Interpersonal Violence: Readings in Research and Application* (Randall Lockwood & Frank R. Ascione, eds. 1998); Frank R. Ascione, *Domestic Violence and Cruelty to Animals*, 17 *The Latham Letter* 1 (1996).

¹² The law in twenty states now expressly authorizes courts to issue restraining orders protecting family pets in domestic
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For example, once viewed as culturally acceptable “sports,” dog fighting and cockfighting are now crimes in every state. Pitting animals against each other and forcing them to fight, often to the death, for the amusement and financial gain of human handlers and spectators is no longer an activity that conforms to the prevailing morals of American society. Dog fighting is now a felony offense in every state.¹³

Cockfighting, which enjoyed a longer tenure as a lawful activity in the United States, was finally criminalized nationally when New Mexico and Louisiana joined the rest of the country and enacted bans in 2007 and 2008 respectively.¹⁴ In an eloquent discourse on the subject, a Pennsylvania judge aptly summarized the rationale for criminalizing the cruel “sport”:

[I]f there is one commodity of which there is no need for a further supply, it is violence. If there is one school that the world can afford to miss, it is one for the tutoring of methods of violence, brutality and cruelty. In Pennsylvania

violence, family offense, juvenile delinquency and criminal cases. Many courts also issue bans on defendants’ contact with animals as part of sentencing in animal cruelty cases as a means of ensuring that offenders do not have access to potential animal victims.

¹³ American Society for the Prevention of Cruelty to Animals, *Dog Fighting FAQ* (2010), www.aspca.org/fight-animal-cruelty/dog-fighting-faq.aspx (last accessed Oct. 4, 2011).

¹⁴ N.M. Stat. Ann. § 30-18-9; La. Rev. Stat. Ann. § 14:102.23, 24.

we can well do without a cockfight which involves nothing less than the torture of helpless animals.

Hart, 42 Pa. D. & C. 3d at 184-85.

In recent years, states have enacted a variety of other laws to protect companion animals, recognizing an expanding social focus on the health and welfare of those species who live closest to humans. These measures include statewide anti-chaining and anti-tethering laws for dogs;¹⁵ regulation of “puppy mills” aimed at preventing a plethora of industry abuses that have led to large scale animal cruelty;¹⁶ prohibitions

¹⁵ Tethering and chaining as a principal means of dog restraint have been identified as heightening the risk of aggressive behavior as well being especially inhumane for dogs who are social creatures and thrive on interactions with people and other dogs. Kenneth A. Gershman *et al.*, *Which Dogs Bite? A Case Control Study of Risk Factors*, 93 *Pediatrics* 6, 913-17 (June 1, 1994), <http://pediatrics.aappublications.org/content/93/6/913> (last accessed Oct. 4, 2011); Karen Delise, *Fatal Dog Attacks: The Stories Behind the Statistics* (Anubis Press 2002).

Connecticut and Louisiana have recently enacted statewide anti-chaining bans while California, Hawaii, Texas, Virginia and Nevada limit chaining and tethering in their anti-cruelty provisions. Numerous localities, including most recently New York City, have enacted similar ordinances.

¹⁶ A “puppy mill” is a commercial breeding operation that presents a high likelihood of animal suffering, because operators focus on profit, at the expense of the physical and emotional needs of the animals involved. Puppy mills are the principal source of purebred puppies sold in pet stores in the United States. Laws limiting the potential for abuse in puppy mills are already in place in many states, and were most recently enacted in Pennsylvania, Iowa, Oklahoma and Missouri, and regulate

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on certain methods of euthanasia of shelter animals;¹⁷ and measures to ban or restrict painful and medically unnecessary practices such as the “debarking” (surgical modification of vocal cords to eliminate the ability to vocalize) of dogs and the declawing (onychectomy) of cats.¹⁸

III. STATE ANTI-CRUELTY LAWS HAVE INCREASINGLY INCORPORATED PUBLIC MORAL JUDGMENTS ABOUT THE TREATMENT OF ANIMALS USED FOR FOOD

State anti-cruelty law schemes have evolved not just to offer more protection to companion animals but to improve the treatment of animals that people

many facets of the dog production industry, including housing, veterinary care, feeding, rest between breeding cycles, exercise, recordkeeping and consumer disclosure requirements.

¹⁷ Many states have outlawed particular methods of euthanizing animals, including use of decompression and gas chambers, gunshot and drowning, based on public sentiments about the proper way animals should die. State laws increasingly require use of the method with which much of society is most comfortable – an intravenous injection of a euthanasia solution administered by a trained professional.

¹⁸ Mass. Gen. Laws Ann. ch. 140, § 138a (2010) (bans devocalization of a dog or cat except where medically necessary). *See also* 18 Pa. Cons. Stat. § 5511 (restricts debarking and partial amputation of the tail “tail docking” unless done by licensed veterinarian under anesthesia); N.J. Stat. Ann. § 4:19-38 (criminalizes debarking unless medically necessary and performed by licensed veterinarian with appropriate pain management); West Hollywood Mun. Code § 9.49.020 (2007) (prohibits nontherapeutic declawing).

use for food and fiber. This coverage and expansion into agricultural animals – the largest numbers of animals used by our society – is nothing but a natural progression and exercise of the traditional power of the states to enact laws to ensure that animals within their borders are not treated cruelly. Longstanding state provisions reflect the sentiment that even animals used for agricultural purposes should have their basic needs met and should be free from unnecessary pain and suffering.

The anti-cruelty laws have in fact *always* covered the treatment of agricultural animals at some level, and the laws have historically included language that places restrictions on the use, transport and handling of working animals and animals destined for our plates. Prohibitions on “cruel carrying,” “overloading,” “overdriving” and “overworking” are common elements of anti-cruelty schemes, have been in many state codes for hundreds of years, and may be applied to the use of farm animals to prevent them from being forced to endure conditions beyond their physical capacity.¹⁹

¹⁹ See, e.g., Cal. Penal Code § 597 (criminalizes overdriving, overloading, driving when overloaded, or overworking any animal); Fla. Stat. Ann. § 828.12(1) (misdemeanor to unnecessarily overload, overdrive any animal or cause the same to be done); Ga. Code Ann. § 4-13-3 (unlawful for a person to unnecessarily overload or overdrive a horse); Md. Crim. Law Code Ann. § 10-604 (overdriving or overloading); N.Y. Agric. & Mkts., Art. 26, §§ 353, 359 (overdriving, overloading or carrying in cruel or inhumane manner); N.J. Stat. Ann. § 4:22-18 (carrying in a cruel or inhumane manner); Nev. Rev. Stat. Ann. § 574.100(1)(a) (overdriving or overloading); D.C. Code Ann. § 22-1002 (cruelly driving,

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States also impose criminal penalties for performing painful and unnecessary procedures on agricultural animals, such as tail docking, and to prevent methods of training horses to jump that cause loss of balance, discomfort and pain, including “poling” and “tripping.”²⁰

States’ considerations for the proper treatment of animals have included regulation of the methods of transport that may pose danger for animals going to slaughter from distant locations. Recognizing that livestock often travel lengthy distances confined in trucks or other vehicles, the states have enacted provisions to ensure that the manner of such transport is safe, humane and hygienic. For example, state anti-cruelty laws prohibit transporting horses and chickens in “two tier” trucks and require compliance

working when unfit for labor, carrying in cruel or inhumane manner). *See also Pittman v. State*, 18 Ala. App. 447 (Ala. Ct. App. 1922) (conviction upheld for animal cruelty involving overdriving a mule); *State v. Goodall*, 90 Ore. 485 (Ore. 1918) (cruelty conviction upheld where defendant rode a horse for several miles on two different occasions when it had an ulcerated sore on its back); *Commonwealth v. Wood*, 111 Mass. 408 (Mass. 1873) (conviction for overdriving horse); *Commonwealth v. Flannigan*, 137 Mass. 560 (Mass. 1884) (conviction for overdriving horse); *People v. Rourke*, 83 Misc. 2d 175 (Crim. Ct. New York Co. 1975) (permitting an injured carriage horse to work without providing necessary medical care constituted cruelty).

²⁰ *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2910.09; Cal. Penal Code §§ 597g, 597n, 597q; Fla. Stat. Ann. § 828.12; 510 Ill. Comp. Stat. 70/5.01; N.Y. Agric. & Mkts., Art 26, § 368; Tex. Penal Code § 42.09.

with minimum standards of care that seek to prevent travelling compartments from being overcrowded and to provide warm, well-ventilated, sanitary and safe transport.²¹

Most recently, states including California, Colorado, Maine, Oregon and Michigan have enacted laws to prohibit farm animal confinement practices that the citizens of those states considered cruel.²² Successful ballot initiatives in Arizona and Florida banned gestation crates for pregnant sows, and veal crates for calves.²³ California's ban went further to include the

²¹ See, e.g., Ariz. Rev. Stat. Ann. §§ 3-1312, 28-912 (regulating treatment and transport of horses going to slaughter and requiring adequate conditions and veterinary care and euthanasia as soon as practical for horses that become nonambulatory during transit); Cal. Penal Code § 599a; Conn. Gen. Stat. § 22-415 (prohibits carrying horse in a cruel manner or permitting it to suffer in transport); Fla. Stat. Ann. § 828.12; N.Y. Agric. & Mkts., Art. 26, § 359-a (vehicles transporting more than six horses must meet safety, ventilation and space requirements and cannot be more than one tier); R.I. Gen. Laws. § 4-1-7 (requires containers or crates used to transport live poultry to be sanitary and provide sufficient ventilation and warmth and that reasonable care to prevent suffering is provided); Tex. Penal Code § 42.09 (transportation of livestock animal in cruel manner prohibited).

²² Cal. Health & Safety Code §§ 25990, 25991 (eff. 2015); Colo. Rev. Stat. § 35-50.5-102; Me. Rev. Stat. Ann., tit. 17, § 1039; Me. Rev. Stat. Ann., tit. 7, § 4020; Mich. Comp. Laws § 287.746; Or. Rev. Stat. § 600.150.

²³ See, e.g., Ariz. Rev. Stat. Ann. § 13-2910.07 (eff. 2010) (prohibits tethering or confining pregnant pigs, and calves raised for veal, for the majority of a day in a manner that prevents the animals from lying down, turning around and fully extending their limbs); Fla. Const. Art. X, § 21 (misdemeanor to

(Continued on following page)

intensive confinement systems (known as “battery cages”) used for egg-laying hens.²⁴ These state anti-cruelty provisions prohibit forms of confinement that the citizens of each state have found unacceptable and cruel. California also banned the tail docking of cows and prohibited the sale of eggs brought in from out of the state, where the out-of-state conditions did not meet California’s anti-cruelty decisions with respect to egg-laying hens.²⁵ The production of *pate de foie gras* – a pasty substance derived from the livers of ducks and geese who are force-fed so that their livers become abnormally enlarged – will be phased out in California by 2012 as the result of legislation banning the practice. The state of California made a decision, fully within its power to regulate the treatment of animals, that the method of creating *foie gras*

confine or tether a pig during pregnancy in a manner that does not allow her to turn around freely).

²⁴ Cal. Health & Safety Code §§ 25990, 25991 (eff. 2015) (illegal to tether or confine a pig during pregnancy, a calf raised for veal, or an egg-laying hen for the majority of any day in a manner that prevents the animal from lying down, standing up, fully extending its limbs and turning around freely).

²⁵ Cal. Penal Code § 597n (prohibits cow and horse tail docking); Cal. Health & Safety Code § 25996 (prohibits sale or contract for sale of shelled eggs for human consumption when the eggs come from an egg-laying hen that has been confined in violation of § 25990).

should be eliminated, because it can cause extreme suffering and death to the animals involved.²⁶

Just as they articulate the expected standard of care and humane handling of commercial animals in their jurisdictions, state laws also place restrictions on the types of animals that can be used for various purposes, including slaughter for human consumption, based on decisions about the potential suffering inherent in the slaughter process, and moral judgments about what animals should (and should not) be eaten by humans. Prohibitions on a variety of activities connected to trading in the flesh and fur of domesticated dogs and cats have been enacted in Delaware, Florida, New York, New Jersey and Oregon.²⁷ Several states including California, Illinois, Mississippi, Oklahoma and Texas have enacted either outright bans on the slaughter of horses for human

²⁶ Cal. Health & Safety Code §§ 25980-81 (eff. 2012).

²⁷ *See, e.g.*, Del. Code Ann., tit. 11, § 1325A (criminalizes sale or barter of the flesh, fur or hair of a domesticated dog or cat or any product made in whole or part from the flesh, fur or hair of these animals); Fla. Stat. Ann. §§ 828.123, 1231 (bans killing dogs and cats to sell or give away pelts); N.Y. Agric. & Mkts., Art. 26, § 379; N.Y. Gen. Bus. Law § 399-aa (unlawful to trade in skin, hair, fur or flesh of a domesticated cat or dog); N.J. Stat. Ann. §§ 4:22-25.3, 25.4, 26 (bans trade in flesh, fur or hair of a domestic cat or dog or any products made therefrom); Or. Rev. Stat. § 167.390 (prohibits commercial uses of fur of a domesticated dog or cat if the fur is obtained by killing or maiming the animal).

consumption or laws that prohibit activities that facilitate slaughter and trade in horsemeat.²⁸

IV. AS AN ANTI-CRUELTY LAW THAT EMBODIES THE STATE'S MORAL JUDGMENT ABOUT ACCEPTABLE TREATMENT OF ANIMALS, SECTION 599f IS NOT PRE-EMPTED BY THE FMIA

California built on its history and authority to implement anti-cruelty legislation when it enacted Section 599f, which prohibits the transport, holding and slaughter of animals for human consumption, when the animals cannot stand up and walk.

The impetus for Section 599f came in 2008 when the Humane Society of the United States released videotapes taken at the Westland/Hallmark slaughterhouse in California. The footage depicted nonambulatory cows being kicked, dragged, electrocuted, jammed with forklifts and sprayed in the nostrils with water to simulate drowning – in an effort to get them to stand up and walk to their slaughter.

²⁸ Cal. Penal Code § 598c (prohibits knowing use of horses for human consumption); Miss. Code Ann. § 75-33-3 (defines “unfit for human consumption” to include horse and mule meat); Okla. Stat. Ann., tit. 63, § 1-1136 (unlawful to engage in commercial activities with respect to horsemeat for human consumption); Tex. Agric. Code § 149-001-007 (bans use of horsemeat for human consumption); 225 Ill. Comp. Stat. 635/1.5 (unlawful to slaughter horses for human consumption and to trade in horsemeat).

The California legislature responded by enacting Section 599f based on its judgment that additional protections should be afforded to nonambulatory animals. Section 599f focuses humane attention on animals who are already in a severe state of suffering that the state believes should be relieved. The law was amended because of indisputable evidence that these animals are especially vulnerable to mistreatment that existing law had not sufficiently addressed. Section 599f prohibits, *inter alia*, the slaughter of nonambulatory animals for human consumption, the sale, purchase, or receipt of nonambulatory animals, and the holding of a nonambulatory animal at a slaughterhouse without taking immediate steps to humanely euthanize the animals. Cal. Penal Code § 599f(a), (b), (c).²⁹

A. The FMIA’s Congressional Purpose is to Safeguard the Food Supply, Not to Ensure Humane Care of Animals

In marked contrast to the animal welfare purpose of Section 599f, the FMIA and regulations promulgated under it are aimed primarily at ensuring the safety of the human food supply, specifically the safety of meat derived from animals who are slaughtered for human consumption. The Congressional

²⁹ “Nonambulatory” means “unable to stand and walk without assistance.” *Id.* § 599f(j). Petitioner’s claims relate only to Cal. Penal Code §§ 599(a), (b) and (c).

purpose as articulated in the Act states in relevant part that “it is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated and properly marked, labeled and packaged.” 21 U.S.C. § 602. To that end, the FMIA and its regulations (embodied in 9 C.F.R. § 300 *et seq.*) govern the inspection of all “amenable species”³⁰ offered for slaughter at federally regulated slaughterhouses, inspection of the meat products derived from that slaughter, handling of animals offered for slaughter while on slaughterhouse premises, marking and labeling of meat products and all recordkeeping necessitated by those processes. 21 U.S.C. §§ 601 *et seq.*, 9 C.F.R. §§ 300 *et seq.*

Nothing contained in the FMIA or its regulations dictates that federally regulated slaughterhouses must accept *any* animal for slaughter. Rather, consonant with its Congressional purpose, the Act is focused on processes that will ensure the safety of meat that is in fact produced at these facilities, from animals that are indeed slaughtered. Therefore, the area in which Section 599f legislates (deciding, for humane reasons, that certain identifiable animals should not be slaughtered for human consumption in California) is entirely distinct from the area with which the

³⁰ “Amenable species” are defined as “those species subject to the provisions of th[e FMIA] . . . and any additional species that the Secretary considers appropriate.” 21 U.S.C. § 601(w).

FMIA is concerned (inspection and recordkeeping, to ensure meat safety, with regard to animals that are in fact slaughtered for human consumption).

The FMIA's preemption language does nothing to alter this conclusion and indeed supports Respondents' position that the FMIA does not preempt Section 599f. In relevant part, 21 U.S.C. § 678 states:

Requirements within the scope of this chapter with respect to premises, facilities and operations . . . which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia. . . .

This provision delineates a narrow reach of federal preemption, specifically activities that are within the limited "scope" of the FMIA and that are directly related to the operation of slaughterhouses pertaining to the production of safe food products. Section 678 also expressly reserves to the states a wide swath of regulatory power in matters that are tangential to the actual process of slaughter itself. "This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." *Id.*

While Congress and federal agencies can of course preempt state law, there is "a strong presumption against preemption, especially when the state law deals with matters like health and animal welfare which have historically been regulated by states."

Nat'l Meat Ass'n v. Brown, 599 F.3d 1093, 1097 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3083 (2011). *See also Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 n.3 (2009) (state tort claim against drug manufacturer for failing to provide sufficient label warning was not preempted by the Federal Food, Drug, and Cosmetic Act where it was possible to comply with both state and federal law). Great deference is granted where the area of state legislation is within its historic police powers, the assumption being that state laws are not to be superseded by federal law unless that was the clear and manifest purpose of Congress. *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 528 F. Supp. 2d 62 (N.D.N.Y. 2007).

Whether or not the presumption against preemption applies in this case matters little to the result, since the proper “understanding of the scope of a preemption statute must [nonetheless] rest primarily on a ‘fair understanding of congressional purpose’” in enacting the federal law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 n.27 (1992) (opinion of Stevens, J.). The only “fair understanding” of the Congressional purpose underlying the FMIA is that it is intended to safeguard the food supply by regulating the inspection of animals slaughtered for food and the resulting meat products derived from that slaughter. Neither the statement of Congressional purpose nor the letter of the law itself evidence an intent to regulate matters that are unrelated to the inspection and slaughter of animals in federal facilities and the

labeling of resulting meat products. When a state makes a moral judgment based on animal welfare considerations that its citizens wish to remove a specific type of animal from the meat production process, whether it makes that decision for an entire species or for animals that occupy other distinct categories such as those that cannot stand and walk, that decision is well outside the Congressional intent of FMIA and therefore not preempted by federal law.

The Ninth Circuit correctly observed that:

States aren't limited to excluding animals from slaughter on a species wide basis. . . . Regulating what kinds of animals may be slaughtered calls for a host of practical, moral and public health judgments that go far beyond those made in the FMIA. These are the kinds of judgments reserved to the states, and nothing in the FMIA requires states to make them on a species-wide basis or not at all. Federal law regulates the meat inspection process; states are free to decide which animals will be turned into meat.

Nat'l Meat Ass'n, at 1098-99. Therefore, the court continued, Section 599f does not regulate the "premises, facilities and operations" of slaughterhouses within the scope of the FMIA.

The Ninth Circuit correctly noted that the case at bar is similar to the two circuit court cases that address the same FMIA preemption language in the context of Texas and Illinois statutes banning the slaughter of horses for human consumption. In

Empacadora de Carnes de Fresnillo v. Curry, the Fifth Circuit held that Texas Agriculture Code Chapter 149 did not seek to regulate the “premises, facilities and operations” of federally regulated slaughterhouses. 476 F.3d 326 (5th Cir. 2007), *cert. denied*, 550 U.S. 957 (2007). Rather, the court ruled that the narrow FMIA preemption language “limits states in their ability to govern meat inspection and labeling requirements. It in no way limits states in their ability to regulate what type of meat may be sold for human consumption in the first place.” *Id.* The FMIA preemption language “is more naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use, matters that [the Texas horsemeat ban] is entirely unconcerned with.” *Id.* The “FMIA does not expressly dispose states of their ability to define what meats may be available for slaughter and human consumption.” *Id.*

The Seventh Circuit reached the same conclusion, rejecting the argument that the FMIA preempted the Illinois Horse Meat Act (which bans slaughter of horses for human consumption), and concluding that if a state allows horsemeat to be produced for human consumption, the FMIA would control the inspection and recordkeeping process of that production. If, however, production of horsemeat for human consumption is prohibited, “there is nothing so far as horsemeat is concerned, for the Act to work upon.” *Cavel v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008).

B. Section 599f Governs Only Humane Treatment of Animals in California and Does Not Regulate Slaughterhouse Functions

In determining that the treatment of nonambulatory animals headed for slaughter is cruel, and by requiring humane treatment of those animals and prohibiting the slaughter of nonambulatory animals for human consumption, Section 599f is no different than any other anti-cruelty law that restricts or prohibits abusive behavior because it runs counter to prevailing community norms. Section 599f seeks to prevent the considerable suffering inflicted when animals that are too sick or disabled to stand and walk to their death, are compelled to do so through a variety of inhumane means. By making sale of meat from downed animals illegal as well, Section 599f further affirms the moral judgment that the production of meat from these animals contains a potential for animal cruelty that the State of California has decided is unacceptable. As an anti-cruelty law with an intent, purpose and effect entirely distinct from those of the FMIA, Section 599f does not tread on the scope of the FMIA and is not preempted by that Act.

Since there is no comprehensive federal law protecting livestock from cruel and inhumane treatment,³¹

³¹ The Animal Welfare Act (AWA) expressly exempts livestock from its coverage. 7 U.S.C. § 2132(s). Other federal laws provide very limited legal protection for livestock in transit or at the slaughterhouse, regulate only small, discrete parts of

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safeguards against animal abuse are derived principally from state anti-cruelty laws, which as discussed *supra* have evolved to encompass humane livestock treatment provisions. The State of California amended its anti-cruelty law to address the treatment of non-ambulatory animals based on the same humane concerns and authority upon which the rest of its anti-cruelty laws are premised. When it comes to mistreatment of nonambulatory animals at slaughter facilities, the abuse is gruesome and well documented. The Food Safety and Inspection Service (“FSIS”), the agency responsible for slaughterhouse inspections, has issued a series of noncompliance reports that illustrate a shocking array of abusive behaviors at all phases of the process involving nonambulatory animals at slaughter facilities, from unloading upon arrival until the debilitated animals are forced through a real-life shop of horrors to the slaughter floor.³²

In the spirit of anti-cruelty laws that came before it Section 599f seeks to prevent this sort of horrific cruelty from being inflicted on nonambulatory animals. It does this by removing them from the slaughter process entirely and by making sale of their meat likewise illegal.

the overall slaughter process, and do not directly address the humane concerns of Section 599f. *See, e.g.*, 49 U.S.C. § 80502 (animals transported interstate cannot be confined for more than 28 consecutive hours without being unloaded for food, water and rest); 7 U.S.C. §§ 1901-07 (addressing treatment of animals “in connection with slaughter”).

³² *See* Brief for the Non-State Respondents at 11-14.

Section 599f, like the myriad other state anti-cruelty provisions which regulate a vast array of behaviors to protect animals of every species and physical condition, is a legitimate exercise of state police power aimed at putting an end to cruel treatment of nonambulatory animals in the state of California. Like the Texas and Illinois horse slaughter bans, it does not regulate, within the “scope” of the FMIA, the “premises, facilities and operations” of slaughterhouses and therefore it is not “different than or in addition to” the FMIA. Section 599f merely invokes California’s right to determine what kind of treatment of animals will be tolerated within its borders, and by so doing it is entirely outside the purview of the FMIA.

The provisions of the Humane Methods of Slaughter Act (HMSA), 7 U.S.C. §§ 1901-07, do not alter this conclusion, despite the FMIA’s reference to the HMSA’s humane handling provisions. Enacted in 1958 at the behest of human organizations, and amended in 1978 to provide somewhat broader coverage, the HMSA establishes minimum standards for the humane treatment of animals that will ultimately be slaughtered for human consumption. A number of factors indicate that Congress never intended to have the HMSA or the FMIA usurp the states’ rights to legislate animal cruelty, even with regard to animals who might come under the purview of those laws. First, unlike the FMIA, the HMSA does not contain any preemption language, and there is no evidence of legislative intent to replace state level anti-cruelty

laws governing humane treatment of livestock. Second, the legislative record with respect to the HMSA indicates that Congress was well aware of the long history of state regulation in the area of animal welfare and “recognized the difficulties and the problem of constitutionality involved in a criminal statute asserting federal jurisdiction in an area where the States not only have the authority to act but where they have exercised that authority.” H.R. Rep. No. 85-706 at 131. By that statement, Congress acknowledged what *amicus* has established *supra* – that absent extremely compelling and unambiguous language, the HMSA (and its FMIA references) expressly preserved California’s right to enact an anti-cruelty law like Section 599f. Third, the HMSA and FMIA are two separate federal acts, and the HMSA is notably not incorporated by reference into the FMIA. Nor does the FMIA’s preemption clause address HMSA principles – only the scope of the FMIA, which all agree is the production of safe meat for the consumer. The absence of clear Congressional intent to usurp states’ power to decide how animals should be treated in their jurisdictions, the lack of any textual indication that the HMSA has any preemptive force, and the strong presumption against preemption where such intrinsic police powers are at stake, establish that Section 599f is a legitimate component of California’s anti-cruelty law and does not run afoul of the HMSA or the FMIA’s humane handling references.

Other arguments pressed by Petitioner are more fully addressed in Respondents’ briefs but merit some

attention in the context of *amicus*' role, of informing the Court of traditional animal welfare considerations. Like the HMSA, the underlying purpose of FMIA is in no way compromised or undermined by Section 599f's standard approach to legislating against cruelty within the state. It does not alter existing safeguards with respect to ante and post mortem inspection of animals that are to be slaughtered. It merely protects an easily identified class of animals and takes them out of the inspection process altogether. Animals that can legally be slaughtered in California will continue to be subject to the full panoply of inspections dictated by FMIA and attendant regulations, and Section 599f in no way interferes with those processes. That the "type" of animal here is a nonambulatory animal rather than a discrete species is also of no moment since as discussed previously, there is nothing in existing law that draws such an artificial limitation on a state's authority to exercise its police power in crafting its anti-cruelty laws.

Nor does Section 599f(c) directly conflict with the FMIA provisions governing euthanasia of nonambulatory animals since that section requires immediate euthanasia and the FMIA permits segregation and reinspection after a "rest period." But the euthanasia provision in Section 599f applies only in the anti-cruelty context, and only to the unquantified and minute percentage of animals that become nonambulatory after they have entered the slaughterhouse. It remains within California's jurisdiction to determine that such animals, because of the potential for pain

and suffering they might experience, cannot be slaughtered within the state. At that point, they are no longer animals that are subject to the FMIA because they cannot be slaughtered in California.



CONCLUSION

Section 599f is at the very heart and purpose of state anti-cruelty laws, and nothing in the law falls within the scope of the FMIA or interferes with the business of meat production.

The Ninth Circuit decision vacating the preliminary injunction should therefore be affirmed.

Respectfully submitted,

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