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 FOR THE NON-STATE RESPONDENTS

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held that the National Meat Association ("NMA") was not entitled to a preliminary injunction on its claim that the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§601 *et seq.*, expressly preempts certain provisions of California Penal Code Section 599f ("§599f"), a statute that prevents the transport, sale, slaughter, and abuse of animals too injured or sick to stand and walk on their own.

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INTRODUCTION

Each year thousands of pigs are transported to slaughterhouses in such weak, crippled, or unhealthy condition that they collapse on the transport trucks or soon after unloading, and cannot stand or walk. Pushing these animals through the transport, delivery, inspection, and slaughter process in order to turn them into meat for human consumption creates a well-documented danger of cruel mistreatment and increased pain and suffering. California Penal Code §599f represents a reasonable judgment by the people of California that they do not want anyone transporting or buying these animals, and do not want slaughterhouses to receive them or process them into human food. California's law stands in a long tradition of state regulation of livestock husbandry and prevention of cruelty to agricultural animals.

The Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§601 *et seq.*, preempts state law requirements "within the scope of this Act with respect to premises, facilities, and operations" of federally-inspected slaughterhouses. 21 U.S.C. §678. As petitioner and the United States concede, the FMIA *does not* preempt every state law that affects slaughterhouses, or even every state law that regulates what slaughterhouse workers do on or near the premises of a slaughterhouse. The "operations" of a slaughterhouse are the "practical work" of turning animals into meat, *see* NMABr.33 & n.12, *i.e.*, "'the slaughter of animals and the preparation of the carcasses, parts thereof, meat and meat food products,'" U.S.Br.24 (quoting 21 U.S.C. §623(a)). The "scope" of the FMIA covers—and is limited to—a system of inspections that must occur, and rules that must be followed, before meat can be

sold in interstate commerce for human consumption. Importantly, however, nothing in the FMIA or the regulations *requires* a slaughterhouse to present any particular animal for inspection and slaughter.

Through §599f, California does not regulate the "practical work" of turning animals into meat, and it does not attempt to alter in any way the federal inspections that must occur before meat can be sold in interstate commerce. It removes a class of animals from the human food production chain entirely, for moral and humane reasons. Every court that has considered the issue has held, correctly, that state laws of that nature are not preempted. There is no requirement that such laws must withdraw entire species (like horses, dogs, or cats) from slaughter or turn on "immutable" characteristics in order to escape preemption. Laws withdrawing a class of animal from the slaughter process entirely, to advance legitimate regulatory objectives unrelated to the safety of the meat supply, do not regulate slaughterhouse "operations" and are outside the FMIA's "scope." Any doubt should be resolved by the presumption "'that the historic police powers of the States were not to be superseded by the Federal Act unless that were the clear and manifest purpose of Congress.'" *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted).

The district court issued a broad preliminary injunction barring the application of §599f to swine slaughterhouses inspected under the FMIA. That injunction is, at a minimum, overbroad. Section 599f's prohibitions on "delivering" and "receiv[ing]" nonambulatory pigs have nothing to do with slaughterhouse operations. They make ineligible for

slaughter a specific, clearly defined and identifiable category of animals that have become nonambulatory before arrival, because of the increased chance that these animals will suffer if forced through the process—regulatory issues that are plainly within California's power, and outside the FMIA's scope. At least as applied to animals that arrive already unable to walk or stand, §599f(b)'s prohibition on purchasing nonambulatory animals and §599f(c)'s humane euthanasia requirement just operate as reasonable adjuncts to the receipt and delivery provisions. And §599f(b)'s ban on the sale of meat products for human consumption that are produced from nonambulatory animals also is not a regulation of slaughterhouse operations; it regulates the "commercial sales activities of slaughterhouses," an area that the United States *concedes* states may regulate. U.S.Br.17. As applied to animals that become nonambulatory after ante-mortem inspection, §§599f(b) and (c) present a closer case. But those provisions, too, are best understood as humane measures that do not regulate slaughterhouse "operations" and are outside the FMIA's scope.

STATEMENT OF THE CASE

I. REASONS FARM ANIMALS BECOME NONAMBULATORY AND THE CONSEQUENCES

The general absence of federal or state humane regulations on farms, and the economic dynamics of industrial-scale agriculture, have produced a persistent problem with livestock, including pigs, that arrive at slaughterhouses so injured or ill that they cannot stand or walk, or soon become unable to stand or walk. Once these animals go down, continuing to move them through the production process causes great suffering.

The abuse of nonambulatory livestock has garnered significant attention in recent years. In January 2008, the Humane Society of the United States ("HSUS") released the results of an investigation into the Hallmark Meat Packing Company and Westland Meat Company, Inc., located in Chino, California ("Hallmark/Westland").[1] The investigation revealed cruel practices being used to force dairy cows to slaughter who were too sick and injured to stand and walk, including "ramming cows with the blades of a forklift . . . [and] dragging them with chains pulled by heavy machinery."[2] Another investigation into practices at the Bushway Packing plant in Grand Isle, Vermont, documented veal calves too sick, weak or injured to stand enduring horrific abuse.[3] Nonambulatory calves were repeatedly kicked and shocked in their necks, faces, and torsos in an effort to force them to move off arriving trucks, to holding pens, or to the slaughter line. *Id.* One calf was videotaped being electrically shocked more than thirty times, and also kicked, slapped, and lifted and dropped. *Id.*

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[1] *See* HSUS, *Rampant Animal Cruelty at California Slaughter Plant: Undercover investigation finds abuse at major beef supplier to America's school lunch program* (Jan. 30, 2008), http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html.

[2] Mot. to Intervene, No. 08-1963, Dkt. 46 (E.D. Cal.) at Ex. 3, Declaration of Nancy Perry ("Perry Decl.") ¶22 & Attach. E (Testimony of W. Pacelle) at 1.

[3] *See* HSUS, *Abused Calves at Vermont Slaughter Plant; Shocking Cruelty caught on video* (Oct. 30, 2009), http://www.humanesociety.org/news/news/2009/10/calf_investigation_103009.html.

The problem of nonambulatory pigs, in particular, is widely recognized in the slaughter industry. These pigs face great risks of suffering and abuse, because "[m]aintaining an adequate level of animal welfare at the plant level is impossible if the pigs are too weak to walk through the yards."[4]

Most pigs who go down do so for reasons that begin long before the animals arrive at the slaughter facility. As one industry article explained, "[t]he packer is at the mercy of the pigs' experiences prior to arriving at the plant."[5] The so-called "fatigued pig syndrome" is a convenient label invented by the industry to justify the number of animals who become nonambulatory for reasons the industry cannot or does not want to explain—likely due to factors of mass production, grueling long-distance transport, and injury that the industry has freely chosen to make an integral part of the business of turning pigs into meat.[6] The best scientific article on the subject concluded in 2008 that nonambulatory pigs suffer from a laundry list of physical and systemic problems, including bone injury; painful foot and leg problems; respiratory, kidney and

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[4] Temple Grandin, *Fixing the downer pig problem*, Meat & Poultry, May 2006, at 82.

[5] John McGlone, *Fatigued Pigs: The Final Link*, Pork Magazine, Mar. 2006, at 14.

[6] Petitioner's *amici* American Association of Swine Veterinarians et al. ("AASV") assert, without support, that the sick, lame, injured and suffering pigs who §599f takes out of the system are simply healthy and tired. AASVBr.14, 18, 19. No scientific or valid industry research is cited for these statements.

liver disease and dysfunction; and infection.[7] The causes of these phenomena include:

Genetic Issues.

The average market weight of a domestic pig has been rising steadily for decades, and is now close to 300 lbs.[8] Pigs are being bred for size and maximum lean muscle mass, without regard for whether the animal's legs and feet can support that mass—or for what other genetic defects are being introduced.[9] For example, "[s]ome genetic lines of lean hybrid pigs have terrible leg conformation" so that their ankles that are entirely collapsed and they are forced to walk on their dewclaws rather than their hooves.[10] Some lines also suffer from "Porcine Stress Syndrome," a genetic disorder that causes pigs to overheat and collapse or die in response to stress. *Id.*; Greger Decl., Attach. K (Animal Welfare Issues Compendium) at 6.

Factory farming methods.

Current industrial farming practices often result in weakened livestock and increase the risk that they will become nonambulatory. Overcrowding of pigs in

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[7] Mahairi A. Sutherland et al., *Health of non-ambulatory, non-injured pigs at processing*, 116 Livestock Sci. 237, 240-44 (2008); *see also* S. Alexandersen et al., *The Pathogenesis and Diagnosis of Foot-and-Mouth Disease*, 129 J. Comp. Pathology 1-36 (2003).

[8] John McGlone & Wilson G. Pond, *Pig Production: Biological Principles and Applications* 225-26 (2003).

[9] *See, e.g.*, Mot. to Intervene No. 08-1963, Dkt. 47 (E.D. Cal.), at Ex. 4, Declaration of Michael Greger ("Greger Decl.") ¶6.

[10] Temple Grandin, *Reducing Fatigue and Non-Ambulatory Pigs in Slaughter Plants to Improve Welfare*, *available at* http://www.grandin.com/meat/reduce.fatigued.pigs.html (last visited Sept. 27, 2011).

indoor facilities can lead to respiratory and other health problems.[11] Farm conditions also can make pigs more difficult to handle at the slaughterhouse. "Pigs finished on metal mesh floors are extremely difficult to drive at the packing plant" because "[t]hese animals grow excessively long hooves and they do not know how to walk on concrete."[12] "Overcrowding of finishing pens also contributes to handling problems." *Id.*

Certain pigs raised in intensive confinement with little or no opportunity to move around may be even more likely to become nonambulatory. Breeding sow stalls are often only about two feet wide, making it impossible for sows to turn around and difficult for them to lie on their sides.[13] Instead, they are often forced to lie with their heads in their feed troughs in positions that cause difficulty walking, grazed skin, and broken limbs.[14] The concrete or slatted floors in the

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[11] Vibeke Sørenson et al., *Diseases of the Respiratory System*, *in* B.E. Straw et al., *Diseases of Swine* 149 (9th ed. 2006); C.M. Wathes, *Aerial Pollutants from Weaner Production*, *in* The Weaner Pig: Nutrition and Management 259 (2001).

[12] Temple Grandin, *Environmental Enrichment for Confinement Pigs*, Proceedings of the 1988 Annual Meeting of the Livestock Conservation Institute, *available at* http://www.grandin.com/references/LCIhand.html (last visited Sept. 28, 2011).

[13] R. Cariolet, *Study of the postures of pregnant blocked sows during the resting period: relationship between width of crates and disorders at farrowing*, Journées de la Recherche Porcine en France 189 (1991).

[14] Compassion in World Farming Trust, *The Welfare of Europe's Sows in Close Confinement Stalls* 10-11 (Sept. 2000), *available at* http://tinyurl.com/62c6fp5 (citing Peter Egle,

stalls can cause foot injuries, inflammation of joints, and skin abrasions that, if infected, can lead to septic arthritis causing severe, chronic pain.[15] As a result of their extreme confinement in these conditions, sows' muscles atrophy and they lose bone strength.[16] "The majority of U.S. breeding sows are so restrictively confined for the great majority of their lives that when they are trucked to slaughter, they are routinely injured, and weak and thus likely to collapse in transit or at slaughter."[17] Factory farms keep sows breeding until they are too old or weak to bear additional pregnancies, and then ship them off for slaughter with no chance to recover any strength. The predictable consequence is collapse *en route* or shortly after arrival.[18]

Erfahrungen bei der Umsetzung der Schweinehaltungsverordnung, Proceedings of DVG Conference on Protection of Domestic Animals 177-83 (Mar. 1998)).

[15] John Webster, *Animal Welfare: A Cool Eye Towards Eden*, 149 (1994).

[16] J.N. Marchant & D.M. Broom, *Effects of dry sow housing conditions on muscle weight and bone strength*, 62 Animal Sci. 105, 105-06 (1996).

[17] Comments of the Humane Society of the United States, Docket FSIS-2010-0041 (Apr. 8, 2011) ("HSUS Comments"), at 35, http://www.regulations.gov/#!documentDetail;D=FSIS-2010-0041-5164; *see* Temple Grandin, *Handling of Crippled and Nonambulatory Livestock*, Animal Welfare Information Center Bulletin, Vol. 9 (Fall 1998), *available at* http://www.nal.usda.gov/awic/newsletters/v9n1/9n1grand.htm (last visited Oct. 1, 2011).

[18] The United States Department of Agriculture's recognition of a similar phenomenon among dairy cows was a factor motivating its prohibition on the slaughter of nonambulatory cattle. Requirements for the Disposition of Cattle that Become

These problems are exacerbated by widespread abuse of the drug Paylean, which increases lean muscle mass but "'makes pigs more susceptible to stress from handling and increases transport stress.'" HSUS Comments, at 34 (citation omitted). It is well understood by the industry that Paylean abuse increases the number of nonambulatory pigs. *Id.* at 34-35; Grandin, *Reducing Fatigue*, *supra* n.10.

Inhumane transport conditions.

"Before they are slaughtered, U.S. livestock may travel an average of 1,000 miles." Greger Decl., Attach. C (*The Long Haul: Risks Associated with Livestock Transport*) at 301. The transport of animals can result in grave injury, severe stress, and death.[19] The Food and Agriculture Organization of the United Nations has concluded that the "[t]ransport of livestock is undoubtedly the most stressful and injurious stage in the chain of operations between farm and slaughterhouse and contributes significantly to poor animal welfare and loss of production."[20] Animals may

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Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11,463, 11,464-65 (Mar. 18, 2009). According to USDA, milk producers have an incentive to "[h]old[] dairy cattle until they become exceptionally old or weak before sending them to slaughter" in order to "extract as much milk as possible," but "[s]ending such weakened cattle to slaughter increases the chances that they will go down and then be subjected to conditions that are inhumane." *Id.* at 11,465.

[19] Temple Grandin, *Introduction: Management and Economic Factors of Handling and Transport*, *in* Livestock Handling and Transport 4-5 (Temple Grandin ed., 2000).

[20] Food and Agriculture Organization of the United Nations, *Guidelines for Humane Handling, Transport and Slaughter of Livestock* (2001), *available at* http://www.fao.org/DOCREP/003/X6909E/x6909e08.htm; *see*

be killed, injured, dehydrated, starved, and severely stressed as a result of being confined during transport in overcrowded vehicles where they are exposed to temperature extremes and routinely denied food and water. The United States Department of Agriculture ("USDA") only recently acknowledged it had authority to enforce a law, which had been on the books for decades but was widely ignored, requiring animals transported by truck for more than 28 consecutive hours to be let out and given food, water, and a chance to rest.

Thousands of pigs are loaded into trucks every day and shipped to California from as far away as Nebraska and Texas. Truck transport is especially harmful to pigs, chiefly because they cannot regulate their body temperatures well, and are therefore extremely sensitive to heat and cold. Nationwide, approximately 220,000 die, and another 440,000 become nonambulatory, annually during the transportation process.[21] Merely increasing the truck space for each pig from 0.39 square meters to 0.48 square meters appears to cut the incidence of dead or nonambulatory animals upon arrival dramatically, but such simple preventive measures are often ignored because

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generally Greger Decl., Attach. C (*The Long Haul*).

[21] The American Farm Bureau estimates that 100 million pigs are slaughtered annually in the U.S. *See* Comments of the American Farm Bureau Federation, Non-Ambulatory Disabled Veal Calves and other Non-Ambulatory Disabled Livestock at Slaughter: Petitions For Rulemaking at 4, Docket FSIS-2010-0041 (Mar. 22, 2011), http://www.regulations.gov/#!documentDetail;D=FSIS-2010-0041-4456. The National Pork Board estimates that 0.22% of pigs transported to market die and 0.44% become nonambulatory. *See* National Pork Board, *Transport Quality Assurance Handbook* 25 (2008), *available at* http://tinyurl.com/6fqa9v6.

trucking companies have limited economic incentives to deliver animals in healthy condition. Greger Decl., Attach. D (*Effect of floor space during transport of market-weight pigs*) at 2861. Stress incurred during transport may manifest after the pig has arrived at the slaughterhouse,[22] and can be exacerbated by the common practice of depriving animals of all food for 12 to 24 hours prior to slaughter.[23]

Rough Handling at the Slaughter Facility

Aggressive handling of pigs at any stage of the production process, particularly when it involves the use of an electric prod, "can result in the metabolic response associated with downer pigs." *Id.*, Attach. G (*Stressful Handling of Pigs*) at 3; *see also id.*, Attach. I (*Livestock Trucking Guide*) at 6 ("In one study, hogs which were repeatedly shocked with electric prods and handled roughly had five times as many non-ambulatory stressors compared to hogs handled carefully."). The length of time pigs are left packed into the truck at the slaughter facility before being unloaded by slaughterhouse personnel also is positively correlated with the number of nonambulatory pigs at the facility. *Id.*, Attach. D at 2862.

As a practical matter, efforts to push nonambulatory animals through the inspection-and-slaughter process unavoidably involve the infliction of pain and stress far greater than what healthy animals experience, and a strong possibility of horrific abuse.

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[22] John McGlone, *Fatigued Pigs: The Transportation Link*, Pork Magazine, Feb. 2006, at 14.

[23] Morgan Morrow et al., *The effect of feed withdrawal on pork quality and the prevalence of salmonella and gastric ulcers at slaughter* 2 (2001), *available at* http://tinyurl.com/4xk76u4.

NMA and the United States suggest that most nonambulatory pigs are just tired and will recover if given a chance to rest. NMABr.11; U.S.Br.28. That simplistic picture conceals a grim reality.

Federal regulations require that nonambulatory pigs be segregated, 9 C.F.R. §§309.2(b), (n), but they do not usually become nonambulatory in convenient locations where they can be given food or water and allowed to rest in place. And slaughterhouse personnel who want to move a 300-pound nonambulatory pig, either to slaughter or to a segregated area to "rest," have simple choices. They can induce the pig to walk by applying pain and/or brute force in some form. And they can push, drag, or otherwise maneuver her using heavy machinery. As members of Congress explained when debating proposed legislation in 2001, "[t]hese animals, known as downers, suffer beyond belief as they are kicked, dragged, and prodded with electric shocks in an effort to move them at auctions and intermediate markets en route to slaughter." 147 Cong. Rec. H6367 (daily ed. Oct. 4, 2001) (statement of Rep. Ackerman). "It is practically impossible to move these animals humanely, so they are commonly dragged with chains and pushed around with tractors and fork lifts." *Id.; see also id.* (statement of Rep. Morella) ("[H]umane euthanasia is the only reasonable solution. It is civilized to oppose needless animal cruelty and inexcusable to allow it to continue."); *id.* at 6368 (statement of Rep. Kelly) (describing measures necessary to move downed animals through slaughter as "abusive and torturous").[24]

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[24] These debates ultimately resulted in a 2002 amendment to the Humane Methods of Slaughter Act ("HMSA"), codified at 7

In practice, the consequences of slaughterhouse efforts to move downed pigs have have been horrifying. HSUS recently compiled Noncompliance Reports from USDA's Food Safety and Inspection Service ("FSIS") showing that slaughter facility personnel have:

- dragged nonambulatory pigs with ropes,
- dragged pigs by their ears,
- dropped pigs from bone-breaking heights,
- caused pigs to be trampled,
- run over pigs with heavy machinery; and
- dumped pigs in "suspect" pens and then denied them any access to water for great lengths of time.

HSUS Comments at 2. Inspectors have observed "conscious and whining" nonambulatory pigs "shackled by their hind legs being dragged into the stunning area" of the slaughter facility. *Id.*, Attach. 2 at 39. One observed a nonambulatory pig with a nearly-severed left hind foot hanging from the pig's leg by the skin—an injury that was apparently the result "of some type of shearing force like that produced by the bucket of the skid steer loader." *Id.* at 107. One watched a nonambulatory, conscious pig being run over by a bulldozer that was being used to move another nonambulatory pig out of the pen. *Id.* at 115. Another witnessed a slaughterhouse employee drive ambulatory pigs over downed pigs, and noted that "[n]o protection was given to the disabled hogs. No attempt was made to move the disabled hogs out of the path of

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U.S.C. §1907, which grants USDA authority to issue regulations it believes necessary "to provide for the humane treatment, handling, and disposition of nonambulatory livestock by stockyards, market agencies, and dealers." The law does not address the issue of nonambulatory animals at slaughterhouses.

the ambulatory hogs." *Id.* at 112.

II. CALIFORNIA PENAL CODE §599F

"The regulation of animals has long been recognized as part of the historic police power of the States." *DeHart v. Town of Austin*, 39 F.3d 718, 722 (7th Cir. 1994); *accord State v. Double Seven Corp.*, 219 P.2d 776, 779 (Ariz. 1950) ("The state has the right under its police power to regulate the livestock industry, particularly that portion devoted to the slaughter and sale of animals for human consumption.").

Cruelty to animals, in particular, has traditionally been regulated by the states, going back nearly 400 years to the Massachusetts Bay Colony—which proscribed "any Tirrany or Crueltie towards any bruite Creature which are usuallie kept for man's use."[25] All 50 states had codified animal protection laws by 1913. *Id.* at 13-14. Such laws reflect traditional interests in public morality, and the desire of food consumers not to subsidize conduct they find morally abhorrent. *See, e.g.*, *Waters v. People*, 46 P. 112, 113 (Colo. 1896) ("[The anti-cruelty law's] aim is not only to protect these animals, but to conserve public morals . . . ."); *Johnson v. District of Columbia*, 30 App. D.C. 520, 522 (D.C. 1908) (preventing animal cruelty "is in the interest of peace and order and conduces to the morals and general welfare of the community"). States also traditionally have regulated the kinds of animals that can be turned into meat for human consumption, such

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[25] Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, *in* Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1978 at 11 (Animal Welfare Inst. 1978).

as by prohibiting the slaughter of dogs, cats, and horses.[26]

In 1993 California exercised this authority to regulate animal cruelty by enacting the California Downed Animal Protection Act, in response to a Farm Sanctuary investigation documenting evidence of inhumane handling of downed livestock at Hallmark/Westland. Perry Decl. ¶11. That law, codified as California Penal Code §599f, reflected a judgment by the people of California that efforts to slaughter downed animals necessarily involve morally unacceptable risks of egregious inhumane treatment. 1994 Cal. Legis. Serv. ch. 600 at 2961. The legislative record also reflected concern that meat products produced from nonambulatory animals may pose substantial risks to human health, particularly in the case of cattle—which may carry bovine spongiform encephalopathy, or "mad cow" disease. JA 57-62.

Nearly a decade and a half later, HSUS released a video from the second Hallmark/Westland investigation, *supra*, at 4, depicting images of sick and disabled cows being dragged by forklifts, kicked, and electro-shocked on their way to being slaughtered. Federal inspectors were present, but failed to detect or stop these "egregious humane handling violations."[27]

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[26] Cal. Penal Code §598b; Del. Code Ann. tit. 11, §1325(b)(4); Ga. Code Ann. §26-2-160; 225 Ill. Comp. Stat. §635/1.5(a); Mich. Comp. Laws §750.477a; Miss. Code Ann. §97-27-19; N.J. Stat. Ann. §4:22-25.4; N.Y. Agric. & Mkts. Law §96-d; Tex. Agric. Code Ann. §149.002; Va. Code Ann. §3.2-6570.

[27] *See* Office of Inspector General, USDA, *Audit Report: Evaluation of FSIS Management Controls Over Pre-Slaughter Activities* at iii (Nov. 28, 2008), *available at* http://www.usda.gov/oig/webdocs/24601-07-KC.pdf.

The San Bernardino County District Attorney charged a Hallmark pen manager with felony animal cruelty and misdemeanor counts of unlawfully moving a downed animal under former §599f(c).[28] Former Secretary of Agriculture Ed Schafer stated "it is regrettable that these animals were mistreated and I am encouraged and *supportive of these actions* by the San Bernardino District Attorney in response to this mistreatment."[29]

This evidence of continuing cruelty by slaughter establishments prompted the California Legislature to strengthen §599f by adopting an amendment proposed by Respondent Humane Farming Association. Section 599f as amended was signed into law on July 22, 2008 and became effective January 1, 2009.

NMA challenges only three provisions of §599f as amended. The relevant prohibitions state:

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

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

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[28] *See* HSUS, *Hallmark Slaughter Plan Manager Convicted of Felony Animal Cruelty*, http://www.humanesociety.org/news/press_releases/2008/06/hallmark_slaughter_plant_manager_felony_cruelty_conviction_062008.html (last visited Sept. 29, 2011).

[29] Press Release, USDA, Statement by Secretary of Agriculture Ed Schafer Regarding Animal Cruelty Charges Filed Against Employees at Hallmark/Westland Meat Packing Company (Feb. 15, 2008), *available at* http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2008/02/0044.xml (emphasis added).

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

Cal. Penal Code §599f. The statute defines a "nonambulatory" animal as one that is "unable to stand and walk without assistance." *See id.* §599f(i).

III. THE FEDERAL MEAT INSPECTION REGIME

There is no general federal anticruelty law that applies to farm animals.[30] Two separate federal statutes, the Federal Meat Inspection Act ("FMIA" or "Act") and the Humane Methods of Slaughter Act ("HMSA"), regulate the production of meat for human consumption at federally-inspected slaughterhouses.

A. Federal Meat Inspection Act

In response to widespread public outrage following the release of Upton Sinclair's *The Jungle*, Congress inserted into the 1906 and 1907 agriculture appropriations bills an amendment "for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food." Pub. L. No. 59-382, 34 Stat. 669, 674 (1906); Pub. L. No. 59-242, 34 Stat. 1256, 1260 (1907). The amendment gave the Secretary of Agriculture ("Secretary") discretion to establish a process for ante-mortem and postmortem inspection of "all cattle, sheep, swine, and goats"

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[30] The Animal Welfare Act, 7 U.S.C. §§2131-59, exempts most farm animals from the definition of "animal," *see* 7 U.S.C. §2132(g).

slaughtered to provide meat sold in interstate and foreign commerce.

As petitioner and the United States repeatedly concede, the purpose of that inspection process was "'to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce.'" NMABr.3 (quoting *Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4-5 (1918)). Members of both houses emphasized the need to alleviate the public's concerns about the possibility of consuming contaminated meat. *See, e.g.*, 40 Cong. Rec. 9017 (1906) (statement of Sen. Bailey) ("I am deeply anxious to see this Congress enact a law that will restore confidence at home and abroad in the cleanliness of our methods and in the wholesomeness of our meats."). The legislative record contains no discussion of ethical concerns regarding what kinds of animals should be slaughtered, or the treatment of animals within slaughterhouses.

In 1967, Congress recodified the 1907 provision into the FMIA, 21 U.S.C. §§601 *et seq.* Again, petitioners concede that "[l]ike its predecessor, the new legislation had 'one basic and fundamental objective—to insure the wholesomeness and cleanliness of the entire meat supply in th[e] United States.'" NMABr.3-4 (quoting 113 Cong. Rec. 30512 (1967) (statement of Rep. May)); *see also id.* at 43 ("Congress determined that only federal standards could adequately protect meat and meat food products[.]"). Congress declared that "[i]t 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." FMIA §2, Pub. L. No. 90-201,

81 Stat. 584, 587 (1967) (codified at 21 U.S.C. §602). Every court that has considered the FMIA's purposes has agreed that it "was designed to insure that meat products sold to the consumer be clean and safe." *United States v. Seuss*, 474 F.2d 385, 388 (1st Cir. 1973).[31] Again, nothing in the legislative history indicates any concern with animal welfare, with what animals should or should not become meat, or with maximizing the supply of meat.

The 1967 recodification also included the express preemption provision at the heart of this case. It provides in relevant part that:

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

Pub. L. No. 90-201, 81 Stat. 600 (codified at 21 U.S.C. §678).[32] Congress also included a savings clause providing that "[t]his Act shall not preclude any State

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[31] *See also, e.g., Cavel Int'l Inc. v. Madigan*, 500 F.3d 551, 545 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008) ("The Act is concerned with inspecting premises at which meat is produced for human consumption . . . ."); *United States v. Espy*, 145 F.3d 1369, 1371 (D.C. Cir. 1998) (The Act "seeks to ensure safe meat products."); *see also Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1280-81 (Fed. Cir. 2009) (noting that since "Congress enacted the Meat Inspection Act . . . the public has come to expect that federal agencies will police the safety of the food products in interstate commerce"), *cert. denied*, 130 S. Ct. 1501 (2010).

[32] The original Public Law uses "Act," but the bound version of the U.S. Code and some online reference sources use "chapter."

or Territory or the District of Columbia from making requirement [sic] or taking other action, consistent with this Act, with respect to any other matters regulated under this Act." *Id.* (footnote omitted).

Very few decisions have interpreted the relevant language of §678. In the two leading cases, the Fifth and Seventh Circuits held that state laws prohibiting the slaughter of horses for human consumption were not preempted. The Fifth Circuit held that the preemption clause is "naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use" rather than limiting "states in their ability to regulate what types of meat may be sold for human consumption in the first place." *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 333 (5th Cir.), *cert. denied*, 550 U.S. 957 (2007). The Seventh Circuit similarly held that the "[FMIA] is concerned with inspecting premises at which meat is produced for human consumption, *see, e.g.*, 21 U.S.C. §606, rather than with preserving the production of particular types of meat for people to eat." *Cavel*, 500 F.3d at 554. The court reasoned that, while any horse meat that is produced must comply with the FMIA, if horse meat is not produced "there is nothing, so far as horse meat is concerned, for the [FMIA] to work upon." *Id.*

B. Humane Methods of Slaughter Act

In 1958, Congress enacted the Humane Methods of Slaughter Act, Pub. L. No. 85-765, 72 Stat. 862 (1958) (codified as amended at 7 U.S.C. §§1901-07), "to establish as a national policy that livestock should be slaughtered and handled in connection with slaughter only by the 'most humane practicable methods.'" H.R. Rep. No. 85-706, at 133 (1957). Congress tackled the

issue of humane slaughter at the behest of humane associations, and the proposed law garnered overwhelming support and the largest volume of mail the committee had ever received on a single matter. *See* H.R. Rep. No. 85-706, at 131; S. Rep. No. 85-1724, at 3933 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3932, 3932-42. Dozens of witnesses encouraged Congress to ensure that animals who enter the food supply are humanely slaughtered. *See, e.g.*, *Humane Slaughtering of Livestock: Hearing Before the Comm. on Agriculture and Forestry on S.1213, S.1497, and H.8308*, 85th Cong. 59-60, 81, 102, 112 (1958) ("*Hearing on S.1213*") (emphasizing, in particular, that animals must be rendered insensible to pain prior to slaughter).

The HMSA contains no preemption provision, and nothing in the legislative record indicates that Congress intended for the law to become the exclusive source of regulations governing the humane treatment of livestock. In fact, the Committee on Agriculture acknowledged that "virtually all of the States have laws against the inhumane treatment of animals, many of which apparently do apply to slaughterhouse operations," and further "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 authority to act but where they have exercised that authority." H.R. Rep. No. 85-706, at 131. Based in part on this concern, the final Act did not impose criminal penalties, but instead simply directed the U.S. Government to refuse to buy meat from any processor that used inhumane methods to slaughter animals. *See* former 7 U.S.C. §1903 (repealed 1978).

In 1978, Congress repealed that purchasing restriction and amended the FMIA to provide criminal penalties, and to allow the Secretary to suspend facility inspection, if a slaughterhouse employs methods of slaughter or handling in connection with slaughter "not in accordance with the Act of August 27, 1958"—*i.e.*, the original HMSA. 21 U.S.C. §§603(b), 610(b), 676. Congress's purpose was "[t]o amend 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 . . . ." Pub. L. No. 95-445, 92 Stat. 1069, 1069 (1978). A contemporaneous Senate report recognized that the original "impetus for the enactment of the Humane Slaughter Act was a growing national concern for the humane treatment of animals," and indicated that an amendment to strengthen the HMSA was justified by "reports of continued cruelty to and abuse of livestock at the few plants that are not already using humane methods." S. Rep. No. 95-1059, at 2-3 (1978). Nothing in the legislative history suggests any belief by Congress that the amendment would displace traditional state animal cruelty law or state regulation of the kinds of animals that can be slaughtered or sold for human consumption.

C. Relevant Federal Regulations

The first step in the FMIA regulatory process is triggered when a slaughterhouse decides to present an animal for "ante-mortem inspection" under 21 U.S.C. §603. If a slaughterhouse chooses to present an animal for inspection, federal inspectors may either (1) pass the animal for slaughter, (2) identify the animal as "suspect," or (3) condemn the animal and remove it

from the slaughter process.[33] Animals identified as "suspect," including nonambulatory disabled animals, are segregated and removed from the slaughter process unless and until they are readmitted after re-inspection by a federal official. 9 C.F.R. §309.2(b), (g), (i)-(k).

Notably, however, nothing in the FMIA or the regulations *requires* a slaughterhouse to present any particular animal for inspection and slaughter. The slaughterhouse always has the option not to "offer[] for slaughter" any particular animal, 9 C.F.R. §309.1, on humane or any other grounds. The regulations provide that animals that collapse *after* ante-mortem inspection may be released "for a purpose other than slaughter" if the establishment "obtain[s] permission for the removal of such animal from the local, State, or Federal livestock sanitary official having jurisdiction." 9 C.F.R. §309.2(p), *see also* §309.13(d). FSIS's own "Slaughter Inspection 101" "Fact Sheet" explains that:

> If an animal goes down or shows signs of illness after receiving and passing ante mortem inspection before slaughter, the establishment must immediately notify the FSIS veterinarian to make a case-by-case disposition of the animal's condition. *Alternatively, the establishment may humanely euthanize the animal.*

FSIS, USDA, *Fact Sheet: Slaughter 101*, http://www.fsis.usda.gov/Fact_Sheets/Slaughter_Inspection_101 (last visited Sept. 29, 2011) (emphasis

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[33] 9 C.F.R. §§301.2, 309.2; FSIS, USDA, *FSIS Directive 6100.1* at 5 (Apr. 16, 2009), *available at* www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/6100.1Rev1.pdf.

altered). As the Ninth Circuit explained below, "these regulations don't require the slaughter of downer animals; no slaughterhouse operator would be fined by federal authorities if he gave nonambulatory animals medical care and put them up for adoption as pets. Federal regulations require inspection *if* downer animals are to be slaughtered." Pet.App.12a. That conclusion was central to the Ninth Circuit's rejection of NMA's conflict preemption arguments, and neither NMA nor the United States challenge it before this Court.

D. This Action

NMA filed this action against the state respondents nine days before the 2008 amendments to §599f were to take effect and 14 years after §599f originally took effect. Compl., No. 08-1963, Dkt. 1. Petitioner requested broad injunctive relief against the application of §599f to federally-inspected swine slaughterhouses in California. *Id.* at 5. The non-state respondents intervened as defendants. Mot. to Intervene, No. 08-1963, Dkt. 46.

On February 19, 2009, the district court granted NMA's motion for a preliminary injunction in full. Pet.App.53a. The court found that petitioner was likely to succeed on its claim that the entirety of §599f is expressly preempted as applied to swine slaughterhouses, because the statute "requires *meat products* to be handled in a manner other than that prescribed by the FMIA or the USDA regulations" and therefore "imposes inspection requirements upon federally inspected slaughterhouses which are in addition to or different than FMIA." Pet.App.36a-37a (emphasis added). The district court also held that §599f is impliedly preempted because the FMIA

contains "comprehensive requirements for meat inspection, handling and processing" and §599f "imposes different or additional requirements on inspection, handling and processing meat." Pet.App.42a. The district court did not reach NMA's separate arguments that §599f violates the dormant commerce clause and/or is unconstitutionally vague. Pet.App.43a.

In an interlocutory appeal, the Ninth Circuit reversed the district court's grant of a preliminary injunction. The Ninth Circuit recognized that petitioner's arguments pertained only to "section 599f(a)-(c)'s ban on the receipt and slaughter of downer animals," and §599f(e)'s prohibition on dragging nonambulatory animals. Pet.App.17a. It held that NMA is not likely to succeed on its claim that the "receipt and slaughter" provisions are expressly preempted, because those provisions do not "require *any* additional or different inspections than does the FMIA," and do not regulate "'premises, facilities and operations' of slaughterhouses" within the scope of the FMIA. Pet.App.11a. In addition to a careful analysis of the text and purposes of the FMIA, the Ninth Circuit relied on the existing case law holding that state statutes prohibiting the slaughter of a particular kind of animal are not preempted by the FMIA. Pet.App.9a-10a.

With respect to petitioner's implied preemption arguments, the Ninth Circuit recognized that it is "not physically impossible to comply with both section 599f and the FMIA" because "nothing in the FMIA *requires* the slaughter of downer animals for human consumption. . . . Whether they may be slaughtered is up to the states." Pet.App.12a-13a. The court further

held that "NMA's implied preemption claim concerning section 599f's ban on the receipt and slaughter of nonambulatory animals fares no better," because the purpose of the FMIA "is certainly not to preserve the slaughter of any kind of animal for human consumption." Pet.App.11a-14a. The court of appeals acknowledged NMA's argument "that section 599f will prevent the examination of downer animals for disease, hindering federal procedures designed to identify and stem the spread of disease." Pet.App.15a n.7. But it noted that "[n]othing in the record substantiates this concern," and that §599f "doesn't prohibit post-mortem inspection of downer animals." *Id.*

The Ninth Circuit held that NMA was likely to succeed on its arguments that §599f(e)'s ban on dragging nonambulatory animals is expressly preempted, but held that the plaintiffs had not shown that they would be irreparably injured by that provision or that the balance of equities favored a preliminary injunction. Pet.App.16a-17a. NMA did not seek review of that holding. NMA also has abandoned its implied preemption arguments before this Court. NMABr.20 n.10.

SUMMARY OF ARGUMENT

This case is very narrow. It concerns only whether certain provisions of §599f(a), (b), and (c) are expressly preempted by 21 U.S.C. §678 as applied to certain pigs on the premises of federally-inspected slaughterhouses. Petitioner and the United States concede that §599f can be applied away from the slaughterhouse to stockyards, auctions, market agencies, dealers, farmers, and trucking companies. They appear to concede that §599f's regulation of what animals slaughterhouses can *purchase* is not preempted, if the

transaction occurs off the premises. U.S.Br.23 n.7. They concede that no conflict preemption issues are before this Court. The United States concedes that, as a general matter, the FMIA does not preempt state regulation of the commercial sales activities of slaughterhouses. U.S.Br.17. And it concedes that state animal cruelty laws can be applied directly to animals in slaughterhouses, if the animals' treatment would also have violated federal humane handling regulations. U.S.Br.26.

This Court should consider the particular disputed subsections of §599f, under the narrow circumstances presented, separately and carefully. None are expressly preempted under an appropriate understanding of 21 U.S.C. §678, particularly in light of the traditional rule—now undisputed in this case—that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (citation omitted).

The "receipt" provision in §599f(a) just tells slaughterhouse workers that if a truck shows up with pigs that cannot stand those animals cannot be received, which in effect means the livestock dealer (or dealer's agent responsible for transport) must euthanize these animals. Cal. Penal Code §599f(c), (f). It is no more a regulation of slaughterhouse "operations" or within the "scope" of the FMIA than a law requiring the slaughterhouse to turn away a truck that shows up full of kittens or stolen pigs. Slaughterhouse "operations" are the "practical work" of turning animals into meat, NMABr.33 & n.12; U.S.Br.14, and the "scope" of the FMIA is an

inspection process that must be followed in order to protect the public from tainted or unsafe meat. Section 599f(a)'s receipt provision identifies a category of animals that the people of California believe should not be slaughtered on moral grounds, by reference to an unambiguous characteristic that can be produced by agricultural and transport conditions that California is entitled to regulate, and that has manifested itself before those animals arrived at the slaughterhouse. Laws of that nature are not preempted, just like laws banning the slaughter of horses, dogs, and cats.

NMA suggests that §599f(a) is preempted because inability to stand or walk may be a "symptom" of disease, and because identifying pigs that may produce adulterated meat due to disease *is* an aspect of slaughterhouse operations and within the scope of the FMIA's regulation. But pigs become nonambulatory for many different reasons, and §599f(a) does not attempt to identify diseased animals or animals whose meat may be adulterated. It bars slaughterhouses from receiving *all* nonambulatory animals, because their condition means that efforts to move them off the truck will cause excessive suffering.

Section 599f(a)'s prohibition against purchasing nonambulatory animals is functionally similar to the receipt provision and not preempted for the same reasons, since NMA admits that pigs are typically purchased upon arrival or shortly thereafter. That provision also is a reasonable exercise of California's authority to regulate commerce in agricultural livestock. The United States concedes that state regulation of a slaughterhouse's "commercial sales activities" is not preempted. U.S.Br.17. Commercial *purchasing* activities are similarly not a part of

slaughterhouse "operations" and similarly not within the scope of the FMIA. Indeed, NMA and the United States appear to accept that California may prohibit the purchase and sale of nonambulatory animals away from the slaughterhouse. But the fact that a truckload of animals makes it onto slaughterhouse grounds does not transform purchasing into slaughterhouse "operations" or bring it within the scope of the FMIA.

Section 599f(b)'s ban on the sale of meat products derived from nonambulatory animals also is not a regulation of the "operations" of the slaughterhouse and is outside the FMIA's scope. The United States forthrightly concedes that "[t]he FMIA does not in general expressly preempt state regulation of the commercial sales activities of slaughterhouses." U.S.Br.17. The government offers contorted arguments that this particular sale regulation must be understood as something else, because as a practical economic matter it will induce slaughterhouses to voluntarily change what they do. This Court rejected a very similar argument in *Bates v. Dow Agrosciences LLC*, and held that a state law did not impose any "requirements" related to pesticide labeling merely because, as a practical matter, it would induce the manufacturer to change its label voluntarily. 544 U.S. 431, 445-46 (2005). The government is really saying that §599f's regulation of meat sales will, as a practical matter, frustrate the federal objectives underlying the FMIA—a conflict preemption issue. But petitioner has renounced any conflict preemption arguments before this Court, and for good reason. The FMIA is entirely unconcerned with maximizing the supply of meat, or with protecting slaughterhouse profits. Its only purpose is to protect the public from tainted or

unwholesome meat, and to ensure that animals who become meat are slaughtered humanely. Section 599f does not frustrate those objectives. As applied to purely intrastate meat sales, the government's expansive preemption theory also raises serious Commerce Clause questions that should be avoided.

NMA and the government suggest that §599f(c), which requires humane euthanasia of nonambulatory livestock, overlaps with the scope of 21 U.S.C. §§603(b) and 610(b), which were added by the 1978 amendments to the FMIA and HMSA and require methods of "slaughter" and "handling in connection with slaughter" to be consistent with humane methods designated by the Secretary under the HMSA. Animals that are excluded from slaughter entirely, by state laws like §599f that are outside the regulatory scope of the FMIA, are not handled "in connection with slaughter" and their disposition is not an aspect of slaughterhouse "operations."

Finally, the public health arguments advanced by petitioner and its *amici* have not been tested through any evidentiary process and are baseless. The FMIA and federal regulations always allow slaughterhouses to voluntarily withdraw animals from the slaughter process without ante-mortem inspection. Notifying state and federal officials of the possibility of a contagious disease outbreak thus is at most a side benefit of the FMIA inspection regime, not a necessary or central feature. And §599f might prevent federal inspectors from seeing, while they are still alive, just a very small percentage of the thousands of animals that pass through the slaughterhouse every day. FSIS's own practical advice on this issue is simply that "plant and FSIS inspection personnel should be alert to the

possibility that the presence of a foreign animal disease might go unnoticed when the plant handles or processes condemned livestock without inspection. Such concerns are worthy of discussion at plant and work unit meetings."[34] FSIS even *requires* prompt euthanasia of nonambulatory cattle, and cattle are subject to diseases similar to the swine diseases *amici* identify, including foot-and-mouth disease. Post-mortem inspection is always available, and is adequate to identify most important symptoms. Section 599f does not impair the existing federal regulatory regime in any significant respect.

ARGUMENT

The parties and the United States agree on the governing interpretive principles. "'[T]he States are independent sovereigns in our federal system,'" *Bates*, 544 U.S. at 449 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 479, 485 (1996)), and this Court will not find that federal law preempts state law "unless Congress has made such an intention 'clear and manifest,'" *id.* at 449 (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading," this Court presumes that Congress did not intend to displace state law. *Altria*, 555 U.S. at 77. "That assumption applies with particular force when," as here, "Congress has legislated in a field traditionally occupied by the States." *Id.*; *supra*, at 14-15.

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[34] FSIS, USDA, Questions and Answers, FSIS Directive 6100.1 Rev. 1 Ante-mortem Condemnation #1, http://askfsis.custhelp.com/app/answers/detail/a_id/1193 (last visited Sept. 30, 2011) ("FSIS, Questions and Answers, *FSIS Directive 6100.1*").

Petitioner therefore must show that the FMIA contains a "nonambiguous command to pre-empt" each of the disputed provisions. *Bates*, 544 U.S. at 449.[35]

"[A]ny understanding of the scope of a pre-emption statute must rest primarily on a 'fair understanding of *congressional purpose*.'" *Medtronic*, 518 U.S. at 485-86 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 529 n.27 (1992)). This Court will look to legislative history to inform that "fair understanding." *See, e.g.*, *Bates*, 544 U.S. at 452 n.26 (legislative history supported the Court's interpretation of the FIFRA preemption clause); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 745-47, 752-57 (1985) (discussing the legislative histories of ERISA and the NLRA to support holding that state law was not expressly preempted by those statutes), *overruled in part on other grounds*, 538 U.S. 329 (2003). And when, as here, the statute also includes a savings clause, this Court disfavors interpretations that leave that clause with no important scope of operation. *E.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 867-68 (2000) (savings clause indicates Congress's belief "that there are some significant number of . . . cases to save").

Congress plainly did not intend for 21 U.S.C. §678 to preempt all state regulation of slaughterhouses, or all state regulation that affects slaughterhouses. NMA concedes, for example, that state building codes,

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[35] NMA argues that this Court already held, in *Rath Packing*, that 21 U.S.C. §678 expresses an unambiguous preemptive command. NMABr.21, 54. The fact that §678 clearly preempts *some* state law does not mean it clearly preempts *every* state law. *Rath Packing* did not even interpret the language at issue here, and has no bearing on this case.

workplace safety requirements, and general criminal laws are not preempted—even as applied to the premises, facilities, and operations of slaughterhouses. NMABr.58 n.20. Any workable interpretation of the FMIA's preemption provision therefore requires careful attention to the activities embraced within slaughterhouse "operations" and to the "scope" of the FMIA—which is best understood as the constellation of regulatory subjects that the FMIA addresses and the problems that it attempts to solve. Section 678 clearly would not, for example, preempt a state statute barring slaughterhouses from receiving or purchasing stolen pigs, and from selling meat products derived from stolen pigs. The FMIA imposes no requirements dealing with stolen pigs, and does not attempt to solve the problem of agricultural theft.

This Court often recognizes that state law is not expressly preempted when it establishes a legal duty with a fundamentally different scope or objective than the federal law. In *Altria*, for example, this Court held that a federal law preempting state advertising requirements "based on smoking and health" did not preempt application of Maine's Unfair Trade Practices Act to a cigarette advertisement making allegedly misleading claims about light and low-tar cigarettes. 555 U.S. at 80-83. The state's separate regulatory interest in preventing *deception* could be applied to smoking advertisements even though the subject of the alleged deception related to the relationship between smoking and health. *Id.* And in *Medtronic* this Court explained that the statute's "overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest" meant that the preemption analysis

"require[d] a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute." 518 U.S. at 500.

The "operations" and "scope" language in 21 U.S.C. §678 require a similarly careful analysis of each of §599f's subsections and how they relate to the legal duties that the FMIA imposes and the regulatory subjects that the FMIA was, and was not, designed to address. NMA and the United States agree that the "operations" of a slaughterhouse are the "practical work" of turning animals into meat, and that requirements "with respect to . . . operations" are those that "address[] 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 can occur." U.S.Br.14; *see also* U.S.Br.24 (explaining that 21 U.S.C. §623(a) uses the term "operations" to refer to "'the slaughter of animals and the preparation of the carcasses, parts thereof, meat and meat food products'") (citation omitted). In a similar vein, the "scope" of the FMIA covers a system of requirements aimed at ensuring the safety of meat for human consumption and, following the 1978 amendments, "preventing the inhumane slaughtering of livestock" or inhumane "handl[ing] in connection with slaughter." 21 U.S.C. §603(b). Properly understood, the disputed subsections of §599f do not regulate slaughterhouse "operations" and are outside the scope of the FMIA.

I. §599F'S BAN ON RECEIVING NONAMBULATORY ANIMALS IS NOT PREEMPTED

Section 599f(a) provides that "[n]o slaughterhouse . . . shall . . . receive a nonambulatory animal." That provision just withdraws a readily identifiable category of animals from the slaughter process entirely, because of moral considerations that are outside the scope of the FMIA's concerns. And it does so at the earliest possible point in the process following transport. *See supra*, at 9-11.

1. A slaughterhouse's decision to turn away an animal or group of animals prior to ante-mortem inspection is not a regulated aspect of slaughterhouse "operations" or within the "scope" of the FMIA. The FMIA provisions and regulations governing ante-mortem inspection apply only to "livestock *offered for slaughter* in an official establishment." 9 C.F.R. §309.1(a) (emphasis added). If a slaughterhouse intends to sell an animal's meat for human consumption in interstate commerce, it must follow these regulations. But if a slaughterhouse decides instead to euthanize certain animals or keep them for other reasons, the regulations do not apply. *See id.* ("All livestock *offered for slaughter* in an official establishment shall be examined and inspected on the day of and before slaughter . . . .") (emphasis added). Nothing in the FMIA or regulations *requires* a slaughterhouse to present any animal or class of animals for inspection and slaughter. *See supra*, at 23-24; Pet.App.12a. And a state law regulating the slaughterhouse's exercise of discretion on an issue outside the scope of the FMIA is, itself, also outside the scope of the FMIA. *See* Pet.App.14a ("Nor do we see

any indication that Congress intended to leave the choice of what kind of animals to slaughter to individual slaughterhouses.").

The fact that the receipt provision applies only to animals who *arrive* in nonambulatory condition underlines that California's regulatory interests here have nothing to do with slaughterhouse operations or the scope of the FMIA. Prior to entering a federally-inspected facility, the animal and its treatment unquestionably fall within the historic police power of the states. These animals generally become nonambulatory because something about their genetic makeup, past husbandry, transport conditions, or other factors occurring *outside* the federally-inspected facility left them weak and vulnerable to collapse. California would be entitled to regulate those issues directly, and to post inspectors on every farm, at every auction, and on every truck. (NMA and the United States conspicuously do not challenge §599f's provisions that prohibit the sale or transport of nonambulatory animals outside the slaughterhouse.) Section 599f(a)'s receipt provision just pursues those regulatory objectives in a far more efficient and effective way, by ensuring that farmers, dealers, and trucking companies have appropriate economic incentives to treat these animals humanely.

2. Petitioner points to FSIS's directive, amended after review was granted in this case, *see* Directive 6900.2, Rev.2, Ch.II, I (effective Sept. 15, 2011), which now provides that "'[o]nce a vehicle carrying livestock enters, or is in line to enter, an official slaughter establishment's premises, the vehicle is considered to be a part of that establishment's premises.'" NMABr.45. Turning away animals that are ineligible

to be processed into meat under state law is not slaughterhouse "operations" or within the "scope" of the FMIA even if it occurs on the "premises." NMA correctly concedes that states may regulate many things that happen on slaughterhouse premises. NMABr.58 n.20.

Regardless, the directive is an arbitrary *ipse dixit* and not entitled to deference. Administrative action "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). FSIS directives "are not regulations and do not carry the force of law," but instead are simply "documents that FSIS issues to provide instructions to its personnel in carrying out FSIS functions."[36] Such "'interpretations contained in policy statements, agency manuals, and enforcement guidelines,'" issued without notice-and-comment procedures, are generally "beyond the *Chevron pale*." *Mead*, 533 U.S. at 234 (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)).

3. The two leading cases interpreting this preemption clause, prior to the decision below, both correctly held that state laws prohibiting the slaughter of horses and the sale of horse meat are not preempted, because the "[FMIA] is concerned with inspecting premises at which meat is produced for human

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[36] FSIS, USDA, *Regulations & Policies: Policy Development Process, FSIS Directive 1232.4* (Nov. 20, 2001), *available at* http://www.fsis.usda.gov/Regulations_&_Policies/Policy_Development_Process/index.asp.

consumption, . . . rather than with preserving the production of particular types of meat for people to eat." *Cavel*, 500 F.3d at 554. Neither NMA nor the United States overtly disagree with *Cavel* and *Empacadora*, and the distinctions they point to are semantic and irrelevant to the real issues.

NMA suggests that nonambulatory pigs, unlike horses, are not a "kind of animal." NMABr. 58-59. But the FMIA regulations themselves identify nonambulatory animals as a distinct category for some purposes, *see* 9 C.F.R. §§309.2(b), 309.3(e), and under its "Revised Animal Welfare Requirements" USDA refuses to buy meat produced from nonambulatory pigs for its own nutrition programs—rendering the United States's effort to block California from adopting similar measures the height of hypocrisy.[37]

The United States concedes that "the bans at issue [in *Cavel* and *Empacadora*] did not require anything different from federal law with respect to slaughterhouse operations within the FMIA's scope," but attempts to distinguish those laws from §599f on the ground that 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." U.S.Br.27-28. The United States chastises the Ninth Circuit for focusing on distinctions that have "no statutory basis" and that are "fundamentally unhelpful," U.S.Br.27, but then commits precisely that error itself. Nothing in 21 U.S.C. §678 makes

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[37] *See* Agriculture Marketing Service, USDA, *Notice to the Trade: Implementation of Revised Animal Welfare Requifrements* [sic] 2 (Dec. 2008), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5074243.

preemption turn on whether characteristics are mutable or immutable. In any event, when a nonambulatory pig arrives on a truck its condition *is* "known to all involved before the animal is within the physical or regulatory reach of the FMIA" and, if §599f(a) was respected, that condition would never "change even while the animal is on the premises of a federally regulated slaughterhouse." U.S.Br.28. At least as applied to those animals, the government's reasoning is circular.

NMA argues that §599f(a) is within the scope of the FMIA because a pig's nonambulatory condition may be a "symptom" of disease. The FMIA does establish processes for the identification of animals suffering from disease, in order to ascertain whether that animal's meat would be unsafe for human consumption. But §599f does not establish additional or different criteria for the identification of disease or of adulterated meat. Livestock become nonambulatory for many different reasons, and §599f does not attempt to identify if the animal is diseased. Section 599f(a) instead establishes a state law duty that slaughterhouses may not receive nonambulatory animals (whether diseased or not) because of humane objectives outside the FMIA's scope.[38] A

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[38] The fact that §599f's sponsors *also* believed that permitting slaughterhouses to process nonambulatory animals would pose public health issues that are closer to the heart of the FMIA's concerns does not invalidate the law's independent moral justifications. State laws prohibiting the slaughter of dogs and cats for human consumption would not become preempted just because legislators also believed their meat was unhealthy. *See, e.g.*, Miss. Code Ann. §97-27-19 (prohibiting the sale as human food of any "dog, cat, or other like unclean animal").

nonambulatory pig is a living, sentient being who has become helpless, may be suffering extreme pain, and is unable to move on her own. The people of California have decided to exempt nonambulatory pigs from the slaughter process in large part because of an unacceptable risk that those pigs, in particular, will endure great suffering during the slaughter process.

In that respect this case resembles *Altria*, where federal preemption of state law requirements "based on smoking and health" did not encompass a state tort action based instead on a state law duty to refrain from deceptive advertising. Section 599f requires slaughterhouses to consider a *fact* (inability to stand and walk) that may also be relevant to the federal inspection regime. But §599f considers that fact under criteria, and to achieve regulatory objectives, that are outside the scope of the FMIA. A state law that attempted to usurp the federal inspection process by substituting more stringent criteria for the identification of tainted meat might well be preempted. *See* Pet.App.10a-11a. But §599f is not that sort of law.

4. NMA and the United States argue that §599f imposes requirements within the scope of the FMIA because 21 U.S.C. §§603(b) and 610(b) require humane methods of slaughter and handling in connection with slaughter. Certainly the FMIA now embraces certain humane treatment objectives, and that fact makes this case more difficult than *Cavel* and *Empacadora*—where the state law against horse slaughter reflected not just humane concerns but a strong and distinct moral judgment that humans should not eat animals that we keep as companions and with whom we have

strong emotional connections. The FMIA does not cover or address that latter subject at all.[39]

Just like the inspection provisions, the humane handling provisions apply only to animals that are being slaughtered or handled *in connection with slaughter*. As explained above, a law prohibiting slaughterhouses from receiving nonambulatory animals does not regulate slaughterhouse "operations" within the meaning of the FMIA—the "practical work" of turning animals into meat. Preventing an animal from entering the slaughterhouse at all, because it is ineligible to be slaughtered under a state law regulating subjects outside the scope of the FMIA, is not a regulation of "handling in connection with slaughter" and therefore is outside the "scope" of 21 U.S.C. §§603 and 610. And the requirements imposed by 21 U.S.C. §§603(b) and 610(b) also are not part of the "scope of this Act" within the meaning of 21 U.S.C. §678. Those cross-references refer to the HMSA as an entirely distinct "Act"—the "Act of August 27, 1958." Congress pointedly did not move the HMSA into chapter 12 of 21 U.S.C., and it remains codified in an entirely different volume of the U.S. Code. At a minimum, the application of the FMIA's preemption provision to laws of this nature is ambiguous, and the

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[39] The FMIA does limit slaughter to certain "amenable species" designated by statute and by USDA. *See* 21 U.S.C. §601(w). But that designation merely identifies species that can be slaughtered without violating the FMIA's own policy objectives. USDA has never contended that its theoretical authority to decide that dogs and cats are "amenable" to slaughter, for federal purposes, preempts state law forbidding such appalling practices on moral grounds. Horses are an "amenable species," and the United States does not contend that *Cavel* and *Empacadora* were wrongly decided.

presumption against preemption applies to protect §599f. *Bates*, 544 U.S. at 449.

The legislative history of the 1978 amendments confirms that Congress expressed no manifest, unambiguous intent to preempt state laws of this nature. Those amendments required federally-inspected slaughterhouses to comply with the slaughter and "handling in connection with slaughter" practices approved by the Secretary under the 1958 HMSA. But the 1958 HMSA merely established minimum federal standards for the humane treatment of animals that were destined to be turned into meat that the United States itself would purchase. Congress recognized that "virtually all States" had enacted laws to address animal cruelty and that "many" of those laws applied to slaughterhouses. H.R. Rep. No. 85-706, at 131. Congress did not include a preemption provision, and stopped short of imposing criminal penalties at least in part because of federalism concerns "in an area where the States not only have authority to act but where they have exercised that authority." *Id.* at 132.

There is zero indication in the legislative history that the 1978 Congress believed it was, for the very first time, making the floor a ceiling and preempting state animal cruelty laws or state laws specifying which animals are eligible for slaughter. To the contrary, the impetus for the law came largely from humane groups (including respondent HSUS) that would never have supported it if they had believed it would be interpreted to preempt state laws like

§599f.[40] Nor would preemption serve the HMSA's purposes. The original HMSA and the 1978 amendments were motivated entirely by a "growing national concern for the humane treatment of animals." S. Rep. No. 95-1059, at 2-3. Congress surely did not intend to immunize slaughterhouse workers from criminal responsibility for intentional and outrageous acts of cruelty to animals that, outside the slaughterhouse gates, would be crimes under state law.

In *Bates* this Court recognized that the "long history" of tort litigation in an area "adds force to the basic presumption against pre-emption" because "[i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." 544 U.S. at 449. Similarly here, Congress would not have nullified longstanding state laws prohibiting animal cruelty and the slaughter of particular kinds of animals for human consumption, in an amendment intended just to modestly *strengthen* protections for animal welfare, without "express[ing] that intent more clearly." *Id.*

II. §599F'S PROHIBITION AGAINST THE PURCHASE OF NONAMBULATORY ANIMALS IS NOT PREEMPTED

Section 599f(a) also provides that slaughterhouses, stockyards, auctions, market agencies, and dealers may not "buy" nonambulatory animals. That restriction is a reasonable exercise of California's authority to regulate agriculture and, as applied to slaughterhouses, functionally similar to §599f(a)'s receipt provision.

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[40] *See, e.g.*, H.R. Rep. No. 85-706, at 131; *Hearing on S.1213*, 85th Cong. 29-36 (statement of Fred Myers, Executive Director, HSUS).

Again, this Court should begin by recognizing that California clearly has authority to regulate the condition of animals that can be bought and sold away from the slaughterhouse, at farms, markets, and auctions. NMA and the United States carefully avoid addressing this issue, *see* NMABr.46-47 n.18; U.S.Br.23 n.7, but regulation of livestock husbandry is a traditional state function entirely outside the scope of the FMIA or anything that can fairly be considered slaughterhouse "operations." If a slaughterhouse's purchases of swine at a far-off auction is slaughterhouse "operations" then presumably so are its purchases of feed and equipment, and the FMIA would give slaughterhouses an exemption from all state regulation of agriculture and commerce. The United States concedes that a slaughterhouse's commercial sales activities are outside the scope of the FMIA, and the same is true of *purchasing* activities.

NMA and the United States focus on purchases that occur after the animals arrive—"upon receipt or, as is typical, after successful ante-mortem inspection." NMABr.47 n.18. But the state and federal interests involved do not change markedly just because a truck containing animals that could not be lawfully purchased off the property happens to make it onto the slaughterhouse grounds, or just because a slaughterhouse cleverly drafts its purchase orders so that title does not shift until arrival. NMA concedes that geography is not decisive; plenty of state laws apply on slaughterhouse premises, if they do not regulate slaughterhouse operations or are outside the scope of the FMIA. NMABr.58 n.20. Congress surely did not intend to preempt state regulation of otherwise criminal commercial transactions, merely because the

perpetrators stepped onto slaughterhouse grounds when the money changed hands. And slaughterhouses will never be in the position of *buying* an animal that has become nonambulatory only later, due to conditions in the slaughterhouse itself.

III. §599F(B)'S BAN ON THE SALE OF MEAT PRODUCED FROM NONAMBULATORY ANIMALS IS NOT PREEMPTED

Section 599f(b)'s ban on selling meat or products of nonambulatory animals for human consumption also is not preempted, because commercial sales activity is not slaughterhouse "operations" and is outside the scope of the FMIA.

1. As the government concedes, "[t]he FMIA does not in general expressly preempt state regulation of the commercial sales activities of slaughterhouses." U.S.Br.17. The FMIA uses "operations" to refer to the "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 can occur," U.S.Br.14, and its "scope" is a series of inspection and handling requirements that must be satisfied before meat can be sold for human consumption. Once meat has been inspected and labeled in accordance with the FMIA, that statute is not concerned with whether or how it is ever actually sold. Just as there is no requirement for any slaughterhouse to slaughter any particular animal, neither is there any federal requirement that slaughterhouses sell the meat they produce, because that conduct is outside the scope of the FMIA.

2. NMA's elaborate textual argument about 21 U.S.C. §642, *see* NMABr.34-35, establishes at most that *record-keeping* is an aspect of slaughterhouse

operations. NMA's contention that anything a slaughterhouse keeps records about under §642 ("all transactions involved in their businesses") is *itself* slaughterhouse "operations" proves far too much—which, presumably, is why the United States rejects NMA's premise. NMA's theory would, for example, preempt state worker's compensation law because the slaughterhouse kept records of payments. It would also mean that a wide variety of activities declared criminal under state law could be conducted by slaughterhouses without any fear of state prosecution, including extortion, fraud, bribery, and the physical abuse of slaughterhouse workers. Congress obviously did not intend such a sweeping result from the FMIA's narrowly drawn preemption clause.

3. Nor is §599f(b) preempted because, as a practical economic matter, it will incentivize slaughterhouses not to process meat from nonambulatory animals. Prohibitions that merely impose indirect economic pressure on actions are not requirements with respect to those actions. This Court has confirmed in the preemption context that a constraint "that merely motivates an optional decision does not qualify as a requirement." *Bates*, 544 U.S. at 433.

Bates involved the express preemption clause in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which provides that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. §136v(b). The Fifth Circuit held that FIFRA preempted Texas farmers' state law claims arising from damage to their crops caused by application of Dow's pesticide because "a finding of liability on these

claims would 'induce Dow to alter [its] label.'" *Bates*, 544 U.S. at 445 (citation omitted). This Court rejected the Fifth Circuit's approach to express preemption as "unquestionably overbroad." *Id.* This Court explained that the preemption clause spoke only to "requirements," which are "rule[s] of law that must be obeyed." *Id.* The lawsuits might, as a practical matter, induce Dow to change its label, but the farmers' causes of action did not rest on legal duties that imposed "requirements for 'labeling or packaging.'" *Id.* at 444.

This Court's opinions in *Cipollone* and *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), are not to the contrary. The issue in *Engine Manufacturers* was whether California's restrictions on the purchase of vehicles that failed to meet certain state emissions standards were preempted by the Clean Air Act, which expressly preempts any state "'standard relating to the control of emissions.'" 541 U.S. at 251 (quoting 42 U.S.C. §7543(a)). As this Court recognized, there was simply no support in the statutory text for the State's argument that the standards preempted by this provision were only those governing vehicle production methods. *Id.* at 255. This Court did not hold, as the United States implies, that the state law was preempted because it would impose indirect economic pressure on manufacturers. This Court held that a law governing what cars may be purchased was, itself, a "standard relating to the control of emissions." *Id.* at 252-55.

The United States's discussion of *Cipollone* misunderstands this Court's holding. *Cipollone* held that a state tort action may impose "requirements" "based on smoking and health" no less than a state

statute, *if* the "legal duty that [was] the predicate of the common-law damages action" was a duty based on smoking and health. 505 U.S. at 523-24. As this Court later explained when discussing *Cipollone* in *Bates*, "[a] requirement is a rule of law that must be obeyed." *Bates*, 544 U.S. at 445. State law does not impose requirements with respect to pesticide labels merely because the state law will create an economic incentive for the manufacturer to change its label. The focus is always on what conduct the state law duty *directly* pertains to. When the United States argues here that any state law that "exerts clear and focused economic pressure of the conduct of a federally regulated activity is no less a 'requirement' with respect to that activity than a direct prescriptive regulation would be," U.S.Br.20, it is attempting to revive the exact same "effects-based" misreading of *Cipollone* that this Court rejected in *Bates*. *See* 544 U.S. at 445.

4. Section 599f(b) also is not "an impermissible effort to add a class of adulteration unrecognized in federal law." U.S.Br.17. Section 599f does not establish criteria for the identification of adulterated meat, but instead for the identification of meat that has been produced in violation of important state policies that have nothing to do with adulteration. In that respect it resembles state law prohibiting the sale of meat derived from stolen animals, or laws prohibiting the sale of horsemeat or dog meat.[41] The *Empacadora*

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41 *See* Tex. Agric. Code Ann. §149.002 (making it unlawful to "sell[], offer[] for sale, or exhibit[] for sale horsemeat as food for human consumption," or to "possess[] horsemeat with the intent to sell the horsemeat as food for human consumption"); Ga. Code Ann. §26-2-160 (prohibiting sale of dog meat for human consumption).

court correctly reasoned that the FMIA's preemption clause is "naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use" rather than limiting "states in their ability to regulate what types of meat may be sold for human consumption in the first place." 476 F.3d at 333. The United States admits that the law at issue in *Empacadora* "did not require anything different from federal law with respect to slaughterhouse operations within the FMIA's scope." U.S.Br.27-28. The same is true of §599f(b).

5. The United States tellingly retreats, in a footnote, to an argument that §599f(b) is "likely" preempted under conflict preemption principles. U.S.Br.21 n.5. That is the real gravamen of its arguments, and NMA's. The availability of conflict preemption analysis of course disproves the United States's suggestion that if this sale ban is not expressly preempted then "nearly any state slaughterhouse regulation" could escape preemption if "recharacterize[d] . . . as a ban on downstream sales of products produced in a manner disapproved by the State." U.S.Br.18. But NMA has affirmatively renounced any conflict preemption arguments before this Court. This Court should not attempt to reach questions that are not presented, but in an appropriate case these arguments would be rejected. As the Ninth Circuit correctly held, there is no direct conflict between §599f and federal law. Pet.App.11a. The FMIA and the federal regulations do not *require* slaughterhouses to process nonambulatory animals into meat, or to sell any meat that results. And §599f(b) does not stand as an obstacle to the FMIA's purposes, which are entirely focused on protecting consumers

from tainted or adulterated meat, not with maximizing the meat supply or protecting slaughterhouse profit margins.

6. Finally, as applied to sales in California NMA's arguments raise serious constitutional questions that should be avoided by a more restrained interpretation of the preemption clause. Congress's power to regulate intrastate meat sales rests on findings that the intrastate marketing of *adulterated* meat could impact interstate commerce by weakening consumer confidence. *See* U.S.Br.7 (citation omitted). But the absence from the California market of perhaps 1% of the meat that federal law would have considered *not* adulterated will have no meaningful impact on interstate commerce. This is not an area where the efficient functioning of interstate commerce requires uniformity. The FMIA explicitly permits states to adopt more rigorous meat inspection requirements for intrastate sales. U.S.Br.7-8. And since the FMIA preempts state labeling requirements, NMA's position would mean that California cannot even identify for its citizens the meat that they do not wish to purchase—meat that the federal government will not purchase itself. There are at least serious questions whether Congress has the power to effectively force state consumers to purchase goods, produced in their state, that they do not wish to purchase. *See, e.g.*, *Florida v. United States Dep't of HHS*, Nos. 11-11021, 11-11067, 2011 U.S. App. LEXIS 16806, at *239-40 (11th Cir. Aug. 12, 2011).

IV. §599F(B)-(C) ARE NOT PREEMPTED AS APPLIED TO ANIMALS THAT BECOME NONAMBULATORY AFTER ARRIVAL

As applied to animals that become nonambulatory only *after* arrival and initial inspection, §599f(b) and (c) present closer preemption questions. Together those provisions require slaughterhouses to euthanize animals that the federal regulations might allow them to segregate and hold for possible reinspection and reintroduction into the slaughter process. Nonetheless, these provisions are best understood as regulating the treatment of animals that have been taken outside the scope of the FMIA altogether by §599f's other provisions.

The receipt, slaughter, and sale bans of §599f(a) and (b) ensure that nonambulatory pigs cannot be slaughtered for human consumption. Slaughterhouse "operations" are the "practical work" of turning animals into meat—the treatment of animals that will not be presented for inspection and slaughter is not part of slaughterhouse "operations." The fact that an FSIS Directive (which does not carry the force of law) requires humane treatment of "'[a]ll animals that are on the premises of the establishment,'" U.S.Br.22 (quoting *FSIS Directive 6100.1* at 4; NMABr.App.47), does not mean that the treatment of every animal on slaughterhouse grounds is slaughterhouse "operations" or within the scope of the FMIA. An animal that cannot be slaughtered also cannot be handled "in connection with slaughter" within the meaning of 21 U.S.C. §§603 and 610. And the preemptive "scope of this Act" described by 21 U.S.C. §678 was never intended to encompass the humane handling practices

specified by the different "Act of August 27, 1958." *Supra*, at 41-42.

The text of the FMIA is at least ambiguous on these issues, and the legislative history reveals absolutely no hint that Congress believed that any of these statutes would displace state animal cruelty law or state law regulating the kinds of animals that can be slaughtered for human consumption. Particularly in an area so close to the heart of traditional state authority and regulation, this Court should apply the usual presumption that Congress does not intend to preempt state law unless it makes that intention clear and manifest. Congress is well acquainted with that longstanding principle, and it provides an excellent guide to a "'fair understanding of *congressional purpose*'" in this context. *Medtronic*, 518 U.S. at 485-86 (citation omitted).

V. THE POLICY CONCERNS RAISED BY NMA AND *AMICI* ARE OVERSTATED

NMA and its *amici* argue that §599f frustrates federal policies concerning uniformity, the detection of communicable disease, and the interaction between state and federal personnel. These concerns are greatly overstated. The issues that NMA and its *amici* identify are ordinary and manageable daily features of the current system and will remain so whether §599f(a)-(c) are preempted or not.

A. The FMIA Does Not Contemplate Uniform State Standards for Slaughterhouse Operations

NMA's concern with uniformity is a red herring. The United States and NMA acknowledge that states have the right to regulate many—if not most—aspects of animal and food production, sale, and purchase.

States can regulate the transport of animals to slaughterhouses. They can decide the type of meat that is sold in their stores, and the type of animals that are turned into meat. U.S.Br.17, 23 n.7. They can still regulate animal cruelty in line with the federal regulations. U.S.Br.26.

Slaughterhouses and their employees also are subject to myriad state laws governing other aspects of their work while engaged in slaughterhouse business. NMA concedes that "state building codes, workplace safety requirements, and general criminal laws" are outside the scope of the FMIA. *See* NMABr.58 n.20. The states can decide who works in the slaughterhouses, and for how long. They can force slaughterhouse workers to leave the slaughter line for mandatory breaks. They can require additional safety precautions and regulate compensation for workplace injuries. They can enforce state laws against physical assaults, theft, discrimination, and infliction of emotional distress. There is simply no protective federal bubble over everything that occurs inside a slaughterhouse. The only activity protected by the preemptive reach of §678 is the "practical work" of ensuring that animals that do go through the system, and the meat that does come out the other end, have been sufficiently tested to protect consumers.

Nor is there anything special about federal policy toward slaughterhouses that particularly requires uniformity of operations or regulation. Indeed, the United States repeatedly emphasizes that the FMIA would permit California to adopt its own separate, and potentially quite different, regime of inspection for intrastate slaughtering so long as it imposed "'requirements at least equal to those imposed under

[the FMIA].'" U.S.Br.8 (quoting 21 U.S.C. §661(c)(1)). Section 599f may perhaps slightly decrease slaughterhouse profit margins in California, but this is not a situation in which divergent state laws threaten to disrupt a complex federal regulatory scheme that requires uniformity for success. *Cf. Bruesewitz v. Wyeth*, 131 S. Ct. 1068, 1080 (2011).

B. Ante-mortem Inspection of All Pigs is Neither Guaranteed Nor Necessary

NMA and its *amici* raise the more serious issue that §599f(c) might, by requiring immediate humane euthanasia of nonambulatory pigs, prevent federal inspectors from detecting some communicable disease that could only be identified while the animal is alive. This concern is overstated.

First, the FMIA and federal regulations allow slaughterhouses to segregate nonambulatory pigs for reinspection and future slaughter, but they do not *require* slaughterhouses to do so. The FMIA and the FSIS regulations present few, if any, barriers to slaughterhouses deciding, at any point, to euthanize an animal instead. Slaughterhouses clearly have total discretion to refuse or euthanize an animals at the time of receipt or before ante-mortem inspection. And even after ante-mortem inspection the regulations allow state and local officials to authorize the release of animals for a purpose other than slaughter. *Supra*, at 23-24. If a slaughterhouse manager independently established a rule that "all animals who are or become nonambulatory shall be humanely euthanized," and state law supported that rule, federal law would not stand in the way.

Section 599f thus simply reflects certain possibilities inherent in the federal system. Indeed,

FSIS *requires* slaughterhouse to "promptly" euthanize cattle that become nonambulatory, and has made clear that "the establishment may elect to condemn and humanely destroy the non-ambulatory, disabled cattle before the PHV inspects and makes a disposition."[42] Cattle certainly get infectious diseases too, including the affliction that concerns NMA and its *amici* the most—vesicular or "foot and mouth" disease ("FMD").[43] FSIS directly addressed the concern that NMA and *amici* raise now:

> Question: Is the establishment allowed to withhold certain livestock from slaughter, humanely euthanize, and dispose of them without presenting them for FSIS inspection? Can FSIS require the establishment to present such animals for inspection to prevent an animal with a foreign animal disease from going un-noticed?
>
> Answer: Yes, the establishment may elect to humanely euthanize livestock and dispose of the carcasses without presenting them for FSIS inspection. However, as a result, plant and FSIS inspection personnel should be alert to the possibility that the presence of a foreign animal disease might go unnoticed when the plant handles or processes condemned livestock without inspection.

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[42] *See* 74 Fed. Reg. at 11,464; *FSIS Directive 6100.1* at 5.

[43] *See* FSIS, USDA, *Reportable and Foreign Animal Diseases* at 29 (2006), *available at* www.fsis.usda.gov/PDF/PHVj-Reportable_and_Foreign_Animal_Diseases.pdf; S. Alexandersen, 129 J. Comp. Pathology 1-36.

> Such concerns are worthy of discussion at plant and work unit meetings.

FSIS, Questions and Answers, *FSIS Directive 6100.1*. In other words, FSIS wisely regards the risk that a disease may go undetected because a relatively small percentage of cattle are euthanized without inspection as a modest concern, "worthy of discussion at plant and work unit meetings" but not a significant regulatory issue and not worth constraining slaughterhouse discretion or causing animals unnecessary suffering. FSIS has not addressed these issues as clearly with regard to pigs, but there too the regulations and directives appear to give slaughterhouses wide discretion to remove an animal from the scope of federal regulations and humanely euthanize it instead of sending it to slaughter. *Supra*, at 23-24.

The bottom line is that the FMIA's ante-mortem inspection process is designed to identify animals with potential problems that might result in tainted meat. "Advance warning" of possible communicable disease outbreaks may be a useful side effect of that process, but it is not a central or necessary purpose.

Second, NMA and its *amici* greatly overstate the significance of this issue in several respects. FMD poses no danger to human health; it is purely an economic issue for the industry that does not implicate the FMIA.[44] And as *amici* concede, AASVBr.11, 17, 18, an outbreak of FMD would almost certainly (1)

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[44] Animal and Plant Health Inspection Service ("APHIS"), USDA, *Fact Sheet: Foot-and-Mouth Disease* (Feb. 2007), *at* http://www.aphis.usda.gov/publications/animal_health/content/printable_version/fs_foot_mouth_disease07.pdf ("FMD is not recognized as a zoonotic disease.").

occur in a large number of animals in any population, and so be quite obvious[45]; and (2) be visible by reference to the vesicles (*i.e.*, blisters) on at least some of the affected animals. When animals become unable to walk *because of FMD*, as opposed to other causes, it is usually in part because they have developed blisters on their hooves that make walking painful. It is those vesicles, not the general symptom of lameness more commonly caused by injury or medical trauma, that will be the "bellwether" of FMD. And those vesicles can easily be identified postmortem. Hog cholera (or "Classical Swine Fever") also does not cause illness in humans,[46] and is generally diagnosed by examining tissue samples from an infected animal post-mortem.[47] The other diseases *amici* point to are not even among the significant causes of "fatigued pig" syndrome. *Supra*, at 5-6.

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[45] When FMD was detected in a slaughterhouse in England, twenty-seven animals were identified with outward signs of the disease. Soren Alexandersen et al., *Clinical and laboratory investigations of five outbreaks during the early stages of the 2001 Foot-and-Mouth disease epidemic in the United Kingdom*, 152 Veterinary Record 490 (2003). The AASV acknowledges that "all animals in a herd are infected" and logically a large percentage would show outward signs of disease by the time some of them could no longer stand.

[46] *See. e.g.*, APHIS, USDA, *Classical Swine Fever: Still a Threat* (Sept. 1999), *available at* http://www.aphis.usda.gov/publications/animal_health/content/printable_version/csfleaf.pdf ("CSF does not cause illness in people . . . .").

[47] J.A. Gardner et al., *Interpretation of Laboratory Results*, *Diseases of Swine*, *supra*, 267, Table 11.25.

More broadly, it certainly is not true that "[i]f [§599f] goes into effect, California will rely solely on a post-mortem inspection regime to detect swine diseases." AASVBr.6-7. Only a very small percentage of pigs arrive nonambulatory. *Supra*, at 10 n.21. An additional even smaller percentage may subsequently go down and be euthanized outside the presence of federal inspectors, but most of those animals have already been inspected once.

Finally, many of the indicia of disease for which NMA and its *amici* insist that ante-mortem inspection is essential cannot be observed in nonambulatory animals anyway. *See* AASVBr.8-10 (discussing FSIS guidelines suggesting that inspectors consider "signs associated with body movement, action and position," including "lameness or limping," "stiffness and pain," "stagger[ing] and circl[ing]," and "abnormal gaits"). Federal inspectors will know that the animal was unable to stand or walk, and would not have been able to gather much more information about these issues ante-mortem than can be discerned postmortem in any event. Neither the FMIA nor the existing federal regulations prioritize gathering every possible bit of information over all other considerations, so there is no genuine reason to view §599f as significantly inconsistent with existing policy.

C. §599f Does Not Create a New Danger of Friction Between State and Federal Employees

The United States raises another red herring by suggesting that laws like §599f create a potential for conflict between state and federal officials. U.S.Br.34. This is not a significant independent issue. Section 599f does not impose any obligations on federal officers; it

applies to slaughterhouses. A federal official could potentially come into conflict with state officials only if he or she was urging or facilitating a violation of valid state law. Federal officials know they are not supposed to do that. Surely the government is not suggesting that this Court hold state law to be preempted solely because complying with a valid state law would be inconvenient for federal personnel.

The United States concedes that state anticruelty laws are not preempted to the extent that they substantively duplicate (as most would) the federal regulations requiring humane treatment of animals. U.S.Br.26. If a federal inspector treated an animal inhumanely, or aided, abetted, or concealed a slaughterhouse's mistreatment, he or she would be subject to investigation and prosecution like any other citizen. Indeed, §599f actually *reduces* the possibility of conflict between state and federal officials by removing a class of animals that is particularly susceptible to inhumane treatment from the slaughter process, and the responsibility and jurisdiction of federal officials.

CONCLUSION

For the reasons set forth above, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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