No. 10-224

In The Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

EDMUND G. BROWN JR., in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA; THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Respondents.

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

REPLY BRIEF OF PETITIONER

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RULE 29.6 STATEMENT

As noted in the Petition, the National Meat Association is an association, not a nongovernmental corporation, and is not required to file a Corporate Disclosure Statement pursuant to Sup. Ct. R. 29.6.

INDEX TO ABBREVIATIONS

The brief in opposition for Respondents Governor Arnold Schwarzenegger, Attorney General Edmund G. Brown Jr., and State of California is referred to as the State's brief ("State").

The brief in opposition for the Non-State Respondents The Humane Society of the United States, Farm Sanctuary, Inc., Humane Farming Association, and Animal Legal Defense Fund is referred to by the name of the first non-state Respondent, The Humane Society of the United States ("HSUS").

The amicus brief of the American Association of Swine Veterinarians and the National Pork Producers Council in Support of the Petition for a Writ of Certiorari is referred to as the amicus brief ("Amicus").

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REPLY TO BRIEFS IN OPPOSITION

Ante-mortem inspection lies at the very heart of the FMIA. Congress' clear intent to preempt state laws interfering with such inspections is evident in the very title of the preemption provision, which provides for the "prohibition of additional or different requirements for establishments with inspection services." 21 U.S.C. § 678. Yet California has directly thwarted this federal scheme, not only prohibiting but *criminalizing* federal ante-mortem inspection of nonambulatory pigs.

Respondents attempt to trivialize the admitted interference by the State as merely "academic" because, they contend, the State law affects only an "extremely small and wholly unquantified," HSUS 10, 32, number of nonambulatory pigs, which are not destined for the food supply in any event. But that argument, which permeates Respondents' opposition, is fundamentally wrong. As underscored by the amicus filing from the American Association of Swine Veterinarians, the State's prohibition on ante-mortem inspection of nonambulatory pigs poses a direct threat to the health of the entire lot of *ambulatory* swine destined *for human consumption*, since the detection of vesicular disease or hog cholera in even one nonambulatory animal may trigger a quarantine of the entire lot. *See* Amicus 4, 6, 10-11. Indeed, a single infection at one premises can threaten up to 100,000 hogs. *Id.* 6. And the uncontested evidence in the record reflects that over 200 pigs a day become

nonambulatory while on the premises of just one California facility. C.A.App. 886 (Terrill Decl. ¶ 9).

The Ninth Circuit nonetheless found that California's criminalization of these federal inspection requirements does *not* impose "requirements . . . with respect to . . . operations . . . different than" the FMIA's. This can only be explained by that court's explicit reliance on the "presumption against preemption" and disregard for this Court's interpretation of the same express preemption provision in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Accordingly, the pure question of law presented by the Petition – a question not dependent on any factual record and clearly pressed and passed upon below – calls for this Court's review.

I. RESPONDENTS' BRIEFS HIGHLIGHT THE NEED FOR THIS COURT TO GRANT CERTIORARI

Though carefully buried on page 32 of its opposition, HSUS is forced to concede that there are legitimate preemption concerns for those swine "who can walk into the slaughterhouse but become nonambulatory in the interval between receipt and slaughter." *See* HSUS 32. There is simply no doubt that pigs that *become* nonambulatory on slaughterhouse premises are, under the FMIA and its regulations, subject to segregation and careful ante-mortem inspection, while under the California law such segregation and ante-mortem inspection are criminal

acts. Section 599f is thus far more than merely "a law preventing nonambulatory animals from 'entering the federal premises at all.'" HSUS 17.

Respondents belittle this concern, suggesting that it is "essentially academic" because there is "zero evidence in the record about the number of animals in this group," which, according to HSUS, don't matter because they are never going to be put in the food supply anyway. HSUS 10-11. That argument betrays at best a studied ignorance of both the record and the regulations.

First, the record evidence is that at one California federally-inspected slaughter facility alone, "[a]pproximately 225 pigs per day are temporarily unable to stand or walk while awaiting slaughter." C.A.App. 886 (Terrill Decl. ¶ 9). These are animals that have been presented for slaughter, but because of stress, sickness or stubborness, cannot or will not move.

Second, the federal ante-mortem inspection regime, as the regulations make clear on their face, is for the protection of, among other things, the entire lot of *ambulatory* animals on the premises who ultimately will become human food. Federal regulations for ante-mortem inspection make clear that the detection of a serious communicable disease in *one* nonambulatory animal may trigger the quarantine or segregation of the *entire herd*, which would otherwise be slaughtered for *human consumption*. *See e.g.,* 9 C.F.R. §§ 309.5, 309.15; *see* State 19-20. Early

detection *pre-slaughter* is critical for this very reason, yet prohibited by Section 599f. The Swine Veterinarians' brief highlights how California's immediate euthanization requirement criminalizes the performance of federal ante-mortem inspection procedures specifically designed for nonambulatory livestock. *See* Amicus 10. Thus, although Respondents erroneously claim that a state law is "'within the scope of' the FMIA only if it imposes additional or different requirements relating to the inspection or slaughter of animals who will be used to produce meat and meat products," HSUS 19, this is precisely what California's criminal law does.

Further, Respondents' entire premise – that the FMIA only applies to animals "presented for slaughter" and intended to enter the food supply – is wrong. *See* HSUS 5. The FMIA applies to *all* animals on federally-inspected slaughterhouse premises.[1] As the Petition also made clear, the FMIA *expressly* "regulates . . . how a slaughterhouse may 'receive' a nonambulatory animal," *see* HSUS 19, with FSIS Directives providing that vehicles arriving at slaughterhouse premises are "considered to be part of that establishment's premises," and that federal inspectors may perform ante-mortem inspection of nonambulatory animals on the vehicle itself, or else ensure that such animals are removed from the

[1] *See, e.g.,* 9 C.F.R. § 302.3: All livestock . . . entering any official establishment . . . shall be inspected [and] handled . . . as required by the regulations in this subchapter.

vehicle and moved "to the designated antemortem areas or pens in a humane manner." Pet. 11; FSIS Directive 6900.1, Rev. 1. These acts, too, are criminal under California law.

Respondents purport to worry that FMIA preemption of the California law would blur the line between a state's legitimate prohibition on the slaughter of horses (or non-free range chickens) and its interference in the FMIA inspection process. *See* HSUS 20; Pet. App. 10a. But that is a false concern. The condition of becoming "nonambulatory," unlike the condition of being a horse or being a grass-fed cow, occurs *on* the federal premises and is detected and addressed as part of the federal inspection process. Indeed, it is the FMIA itself that "offers [the] . . . coherent way to draw th[is] line" by expressly preempting only those state laws impinging upon the "premises, facilities and operations" of any federally-inspected slaughterhouse. Horses, or non-grass-fed or non-free-range livestock, can be kept off the slaughterhouse premises, as well as off the trucks transporting those animals. By contrast, when pigs walk themselves onto a truck, it is not known until that truck arrives at the slaughterhouse and its doors are opened whether any animals are now unable to leave the truck on their own. That the truck must be on slaughterhouse grounds before it is known which animals became unable to stand or walk while in transit brings the preemptive force of the FMIA directly to bear on Section 599f(a). *See* C.A.App. 885 (Terrill Decl. ¶ 5).

Respondents' defense of Section 599f is further undermined by their failure to acknowledge that the FMIA *is*, in fact, a "general federal law . . . preventing cruelty to farm animals," HSUS 4, on federally-inspected premises. The Humane Methods of Slaughter Act, expressly incorporated into the FMIA, *see* 21 U.S.C. § 603(b), ensures that all livestock on slaughterhouse premises – not just those "presented for slaughter" – be handled "in accordance with humane methods." *See* Pet. 9. Respondents fail even to acknowledge the federal regulations governing the humane handling of nonambulatory livestock, even though discussed in three separate places in the Petition. *See* Pet. 3, 10-11, 13, and App. 70a-71a (concerning 9 C.F.R. §§ 313.1(c), 313.2(d)(1)). These regulations mandate that "animals unable to move shall be separated from normal ambulatory animals and placed in [a] covered pen," and held "while awaiting disposition by the inspector." *Id.* Compliance with these regulations would, under the California law, constitute criminal acts. *See* HSUS 1; Cal. Penal Code § 599f(c).

These federal requirements are plainly "different than" those of the State, as the FSIS made clear when it expressly considered and rejected changing federal regulations. 74 Fed. Reg. 11463; Pet. 5, 14, 24. The State simply fails to address the pertinence of the FSIS's decision, State 21, while HSUS cites inapposite decisions from this Court so as to obfuscate the relevance and significance of the FSIS's considered rejection of these requirements, HSUS 23-24.

Notably, HSUS mischaracterizes the FSIS's statements as "a federal decision to *forego regulation* in a given area," *see* HSUS 23 (emphasis added), when nothing could be farther from the truth. Unlike *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, the case HSUS quotes for this proposition, where the federal agency "determined . . . that it *did not have jurisdiction* under the Federal Power Act," 461 U.S. 375, 383 (1983) (emphasis added), the FSIS preserved the federal regulations already in force requiring nonambulatory swine to be inspected and humanely handled rather than mandating immediate euthanization. And here, Congress itself "'convey[ed] an "authoritative" message' that there is a federal policy against [the State's] regulations" concerning the inspection, handling, and processing of nonambulatory swine on federally-inspected slaughterhouse grounds, *see* HSUS 23 (quoting *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002)), by expressly preempting state laws "in addition to, or different than" the FMIA's requirements.

That the Ninth Circuit nonetheless refused to enforce FMIA preemption can only be explained by its holding that, "[c]onsistent with the presumption against preemption, we *must* give this provision a narrow interpretation." Pet. App. 8a (emphasis added).[2] Respondents defend this ruling by maintaining

[2] The Ninth Circuit's own words thus show the presumption against preemption was "passed upon," and arguments against its application were of course "pressed" as well. NMA responded

(Continued on following page)

that *Rath Packing* does not control the presumption's invocation here, but such a contention only further demonstrates the need for this Court's review.

As its own title highlights, the FMIA's preemption provision intentionally uses identical language to effectuate its "prohibition of additional or different requirements for establishments with inspection services *and* as to marking, labeling, packaging, and ingredients":

> *Requirements* . . . with respect to premises, facilities and operations . . . which are *in addition to, or different than those made under this chapter may not be imposed by any State*. . . .
>
> Marking, labeling, packaging, or ingredient *requirements in addition to, or different than, those made under this chapter may not be imposed by any State*. . . .

21 U.S.C. § 678 (emphasis added) (*see* Pet.App. 63a). Yet Respondents assert that because this Court's *Rath Packing* decision focused on the words in the second prohibition rather than the first, its holding as

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to the State's reference to the presumption by pointing to Congress' unequivocal intent in the plain language of Section 678 and to past decisions finding that "Congress has 'unmistakably . . . ordained' that the Federal Act fixes the sole standards." Appellee Br. 26-27. When the Ninth Circuit ignored the authority cited by NMA and made the presumption central to its holding, NMA pointed out this error in its petition for rehearing en banc and its petition to stay the mandate.

to the preemptive breadth of those words "can have no impact on this case," HSUS 25, and the Ninth Circuit could simply ignore *Rath Packing*, as it did. This Court, however, recognizes that when Congress reuses the same phrase in the same statute (let alone in the same paragraph), it intends the same meaning to apply. *See, e.g., National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501 (1998) ("similar language contained within the same section of a statute must be accorded a consistent meaning").[3]

Nor does the "savings" clause found at the end of § 678 justify the Ninth Circuit's "conclusion that there was no express preemption." State 18-19. This Court acknowledged that clause in nonetheless finding preemption in *Rath Packing*, 430 U.S. at 530-31 & n.17, and the Ninth Circuit's opinion that it shows a narrow intent for express preemption is in

[3] Respondents also try to explain the Ninth Circuit's holding as merely allowing a state to make *mandatory* what they say is otherwise *permitted* under federal law – simple removal of an animal from the slaughter process without inspection. HSUS 22. As shown above, that characterization is not accurate for a pig that has become nonambulatory once on the federally-inspected premises. But even if it were accurate, it would be preempted as "in addition to" the federal scheme. *See McMullen v. Medtronic, Inc.*, 421 F.3d 482, 489 (7th Cir. 2005), *cert. denied*, 547 U.S. 1003 (2006) ("Where a federal requirement permits a course of conduct and the state makes it obligatory, the state's requirement is in addition to the federal requirement and thus is preempted.").

direct conflict with what the Sixth Circuit has said is the effect of that clause: "By permitting state action 'with respect to any other matters regulated under this chapter,' Congress is unmistakably ordaining that a state may *not* take action with reference to . . . 'requirements in addition to or different than, those made under this chapter'" for those areas "completely preempt[ed]" by the statute. *Armour & Co. v. Ball*, 468 F.2d 76, 84-85 (6th Cir. 1972) (emphasis added). Rather, the proper effect of this savings clause is to leave to state regulation those matters outside the scope of the FMIA, "such as state building codes, workplace safety requirements, and general criminal laws." HSUS 18. The Ninth Circuit's determination that disease inspection and humane handling requirements lying at the heart of the FMIA were, because of the "presumption against preemption," instead encompassed within this savings clause flies in the face of Congress' express intent, as interpreted by this Court, and that makes this a compelling case for the Court's review.

II. THIS CASE PRESENTS A DISCRETE, CONCRETE, AND IMPORTANT ISSUE OF LAW THAT IS PARTICULARLY SUITED FOR REVIEW BY THIS COURT AT THIS TIME.

Rhetoric aside, Respondents themselves acknowledge "the only legal argument [the Petition] raises is a contention that certain provisions of § 599f are expressly preempted by the FMIA[.]" HSUS 13. That purely legal issue was squarely presented below and rejected by the Ninth Circuit. Pet. App. 7a-11a. The Ninth Circuit's ruling that "[t]here is no express preemption here," *id.* 11a, was a clear, definitive statement of law that is not open to challenge on remand, and the Ninth Circuit refused to reconsider its ruling on rehearing or rehearing *en banc*, *id.* 58a-59a. Should this Court find that express preemption exists and reverse the Ninth Circuit's ruling to the contrary, that would dispose of the matter.

The express preemption issue turns on the language of the relevant statutes, regulations, and agency directives, and the policies expressed therein. *See, e.g., FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990) (express preemption "is compelled [when] Congress' command is explicitly stated in the statute's language[.]") (quoting *Rath Packing*, 430 U.S. at

525). The express preemption at issue here does not depend upon factual evidence in the record.[4]

As the Court's rules request, *see* Sup. Ct. R. 10, the Petition calls the Court's attention to the important, real-world consequences of the Ninth Circuit's failure to enforce the FMIA's express preemption provision. Those consequences are evident in the FSIS regulations and directives themselves, *see* Pet. 31-32, and their importance is further made manifest both by the amicus brief offered by the Swine Veterinarians and by the facts regarding "the immediate risk to animal and human health and safety created by the California law," which "counsels immediate review" by this Court.[5] Pet. 31. Such facts aid the Court's decision in determining whether to grant certiorari, but the merits will be decided by the intent of Congress expressed in the statute and carried out in the implementing regulations.

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[4] Respondents recognize that factual evidence in the record was relevant below to the issue of "conflict preemption," *see* HSUS 12 – an issue that Petitioner has not asked this Court to review. Petitioner has not "waived" or "abandoned" its arguments thereon; it has simply focused its petition to this Court solely on the issue of express preemption.

[5] NMA has not "changed its tune." HSUS 33. NMA said in the courts below and again in n.6 of its Petition that *federally inspected* pigs do not pose a threat to health (and that is why granting the injunction NMA sought did not pose a threat to health); the California law, which would eliminate federal antemortem inspection for nonambulatory pigs, is a direct threat to human and animal health.

Moreover, as noted above, Respondents' remarkable assertions regarding the facts are simply wrong. Whereas HSUS asserts there is "zero evidence" this issue ever comes up, the record shows that, on average, it comes up *225 times a day*, at just a *single* slaughterhouse. *See* p. 3, *supra*. And as the federal regulations and directives show, it only takes one of them – if an ante-mortem inspection reveals a communicable disease – to require the quarantine of a whole herd otherwise destined for human consumption.

This is thus a very important case. Indeed, although Respondents claim the Ninth Circuit did not think this was "a borderline case," HSUS 10, the Ninth Circuit in fact, over Respondents' opposition, stayed its mandate in order to provide this Court a full opportunity to review the express preemption issue now, before the Ninth Circuit's vacation of the injunction ordered by the district court itself upends the long-standing status quo by permitting state law to trump the FMIA. *See* Pet. App. 56a.

In short, this case presents a particularly appropriate vehicle to review the Ninth Circuit's refusal to enforce the express preemption provisions of the FMIA against a state law crucially different than the federal law which this Court has said Congress "unmistakably ordained" should control. That narrow but surpassingly important legal issue was fully briefed, squarely considered, and definitively rejected

by the Ninth Circuit. Its ruling should be reviewed and reversed by this Court now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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