No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Meat Inspection Act ("FMIA"), as amended by the Wholesome Meat Act of 1967 and the Humane Methods of Slaughter Act, comprehensively regulates the "premises, facilities, and operations" of slaughterhouses where meat is prepared for human consumption. Since the passage of the Wholesome Meat Act, the FMIA has expressly preempted state regulations "in addition to, or different than" federal regulations. 21 U.S.C. § 678. Thus, for almost half a century, a uniform federal regulatory framework has safeguarded animal and human health and safety. In 2008, California passed a law – the provisions of which were later considered and expressly rejected by federal regulators – requiring federally-inspected slaughterhouses to "immediately euthanize" any non-ambulatory animal on its premises, thereby eliminating important federally-required ante-mortem inspection of possibly diseased animals.

The questions presented in this case are:

1. Did the Ninth Circuit err in holding that a "presumption against preemption" requires a "narrow interpretation" of the FMIA's express preemption provision, in conflict with this Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977), that the provision must be given "a broad meaning"?

2. Where federal food safety and humane handling regulations specify that animals (here, swine) which

QUESTIONS PRESENTED – Continued

are or become nonambulatory on federally-inspected premises are to be separated and held for observation and further disease inspection, did the Ninth Circuit err in holding that a state criminal law which requires that such animals *not* be held for observation and disease inspection, but instead be immediately euthanized, was not preempted by the FMIA?

3. Did the Ninth Circuit err in holding more generally that a state criminal law which states that no slaughterhouse may buy, sell, receive, process, butcher, or hold a nonambulatory animal is not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally-regulated slaughterhouses?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The petitioner is the National Meat Association ("NMA"), a nonprofit organization whose members are meat packers and processors, equipment manufacturers and suppliers throughout the United States and other countries. NMA, Frequently Asked Questions, http://nmaonline.org/about/faqs (last visited Aug. 10, 2010). NMA brought suit against Respondents Edmund G. Brown Jr., in his official capacity as Attorney General of California; Arnold Schwarzenegger, in his official capacity as Governor of California; and the State of California, seeking preliminary and permanent injunctive relief and a declaration barring the application of Cal. Penal Code § 599f to federally-inspected swine slaughterhouses in the State. The Humane Society of the United States, Farm Sanctuary, Inc., Humane Farming Association, and Animal Legal Defense Fund, were permitted to intervene as defendants and are Respondents to this Petition. The American Meat Institute also intervened, as a plaintiff seeking only permanent injunctive relief with respect to all other livestock governed by Section 599f, and thus was not a party to the preliminary injunction hearing or the appeal to the Ninth Circuit, and is not a party to this Petition.

Pursuant to Supreme Court Rule 29.6, undersigned counsel state that NMA is an association, not a nongovernmental corporation, and therefore is not required to file a Corporate Disclosure Statement pursuant to Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner National Meat Association ("NMA") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's opinion is unreported. Pet. App. 18a. The Ninth Circuit's opinion is reported at 599 F.3d 1093, and reproduced at Pet. App. 1a. The order denying the petition for rehearing and rehearing *en banc* is unreported. Pet. App. 57a. The Ninth Circuit's order staying the mandate pending this petition for certiorari is also unreported. Pet. App. 54a.

JURISDICTION

The Ninth Circuit filed its opinion on March 31, 2010. Pet. App. 2a. That court denied Petitioner's timely petition for rehearing and rehearing *en banc* on May 18, 2010. Pet. App. 57a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Federal Meat Inspection Act, its implementing regulations, and California Penal Code § 599f are set forth in the appendix.

STATEMENT OF THE CASE

Section 408 of the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 678, prohibits states from imposing "[r]equirements . . . with respect to premises, facilities and operations of any [federally-inspected slaughterhouse] establishment . . . which are in addition to, or different than those made under" the Act. Just as this Court held when previously interpreting this section, "[t]his explicit preemption provision dictates the result in th[is] controversy." *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977).

Congress passed the first federal Meat Inspection Act in 1906 to comprehensively regulate slaughterhouse operations in interstate and foreign commerce. 34 Stat. 674 (1906); *see also* 34 Stat. 1260 (1907). Sixty years after its initial passage, the Wholesome Meat Act of 1967 substantially amended the Federal Meat Inspection Act to close a remaining "gap" – intrastate "meat that received no Federal inspection" but instead was subject to disparate state inspections, thus "risking the health of our children and of our

families." Lyndon B. Johnson, Remarks Upon Signing Bill Amending the Meat Inspection Act, 2 PUB. PAPERS 541 (Dec. 15, 1967) (signing Pub. L. 90-201, 81 Stat. 584 into law). To ensure that federal law sets the sole standard for animal health and disease inspection at federally-inspected facilities, the Wholesome Meat Act included the express preemption provision at issue in this suit. 21 U.S.C. § 678.

The FMIA, in its current form, regulates all aspects of federally-inspected slaughterhouse operations. All livestock on such premises are subject to the FMIA's requirements for humane handling, *see generally* 21 U.S.C. § 603(b), and pre- and post-slaughter inspection in order to detect any disease or adulteration rendering the meat unfit for human consumption, *see* 21 U.S.C. § 603(a) (ante-mortem), 21 U.S.C. § 604 (post-mortem), or that may trigger segregation or quarantine of the livestock and notification of higher officials, *see, e.g.,* 9 C.F.R. §§ 309.5, 309.15. As relevant here, these humane handling and inspection requirements include regulations that specifically govern swine that are or become non-ambulatory (unable to rise and walk) while on slaughterhouse grounds, whereby such animals are to be separated, 9 C.F.R. § 313.2(d)(1), and held for ante-mortem (pre-slaughter) inspection, 9 C.F.R. § 313.1(c), after which they may then be passed for slaughter and human consumption, 9 C.F.R. §§ 309.2(b), 311.1(a) – as most are – or classified as condemned, 9 C.F.R. §§ 309.2(b), 309.3, and humanely euthanized, 9 C.F.R. § 309.13(a), Part 313.

California, however, has upset this uniform federal process. By amending California Penal Code § 599f, California, which does not have its own independent state inspection program,[1] now requires that all nonambulatory livestock, including those on federally-inspected slaughterhouse grounds, must be *immediately euthanized* (and barred from human consumption), rather than set aside and held for ante-mortem inspection by federal inspectors. Cal. Penal Code §§ 599f(b)&(c). California's new law thus prohibits federal veterinarians and the inspectors they supervise from conducting the FMIA's required systematic ante-mortem inspection of nonambulatory animals on federally-inspected premises – the primary process by which serious communicable diseases are first detected. In addition, the California law criminalizes the conduct of slaughterhouse employees who attempt to follow the FMIA's requirements (or the direction of inspectors pursuant to the FMIA) with respect to the inspection and handling of nonambulatory swine, thus ensuring that the California law will supplant federal regulations in this area. Cal. Penal Code § 599f(h).

As the district court properly held, California's law is clearly preempted under the plain and explicit preemption provision of 21 U.S.C. § 678: the State's

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[1] *See* FSIS, Listing of States Without Inspection Programs, *available at* http://www.fsis.usda.gov/regulations_&_policies/Listing_of_States_Without_Inspection_Programs/index.asp (last visited Aug. 10, 2010).

requirement of immediate euthanization is "different than" the FMIA's requirements for observation and inspection before further processing. Indeed, the federal government, in amending its regulations in 2009, expressly considered and *rejected* adoption of the very requirements that are now California law.

This conflict between federal and state regulations concerning nonambulatory swine is thus both square and considered. The Ninth Circuit, however, held that the "presumption against preemption," as discussed in *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 n.3 (2009), mandated "a narrow interpretation" of the FMIA's express preemption provision, Pet. App. 7a-8a, without ever analyzing or even mentioning this Court's interpretation of that same provision in *Rath Packing*. This resulted in the Ninth Circuit "twist[ing] the [statute's] language beyond the breaking point," *Rath Packing*, 430 U.S. at 532, by holding that, notwithstanding the federal government's express consideration and rejection of the California requirements, Section 599f(a)-(c) were not regulations of the "premises, facilities and operations" of slaughterhouses, and thus were not preempted.

The Ninth Circuit's decision directly contravenes this Court's precedent in *Rath Packing*, which explicitly rejected ascribing such "restrictive meaning[s]" to the FMIA's preemption clause. 430 U.S. at 532. Unfortunately, the Ninth Circuit's flawed invocation of the presumption against preemption is a byproduct of what another circuit has recently described as the "ongoing disagreement among Supreme Court jurists

as to if, when, and how this presumption applies." *Demahy v. Actavis, Inc.*, 593 F.3d 428, 434 (5th Cir. 2010), *petition for cert. filed*, No. 09-1501 (Jun. 7, 2010). Certiorari is necessary to bring the California law (and the Ninth Circuit) into line with *Rath Packing* and Congress's preemptive intent for the FMIA, and to bring clarity to the lower courts' confusion as to the presumption's role in interpreting express preemption provisions. Such action is all the more important given the public health concerns implicated by the California law.

A. The Federal Meat Inspection Act

In 1906, Congress acted in direct response to the unsanitary conditions of the Chicago meat packing industry documented in Upton Sinclair's *The Jungle* by passing the first Meat Inspection Act. *See generally* FSIS, *Celebrating 100 Years of FMIA*, *available at* http://www.fsis.usda.gov/About_FSIS/100_Years_FMIA/index.asp (May 15, 2006) (last visited Aug. 10, 2010); *see* 34 Stat. 674 (1906); 34 Stat. 1260 (1907). Since the FMIA's enactment, federal law has comprehensively and uniformly governed the interstate meat industry. As the Act's name implies, inspection has always been a core component of the FMIA. This Court recognized early on that one of the "plain object[s]" of the FMIA has been to "enable the officials of the Government to systematize and render effective the processes of inspection," *United States v. Lewis*, 235 U.S. 282, 286-87 (1914), and from its inception the FMIA has "provide[d] an elaborate

system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products, with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce," *Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4 (1918). *See* 21 U.S.C. § 602.

In 1967, Congress amended the FMIA by passing the Wholesome Meat Act, Pub. L. 90-201, 81 Stat. 584, in response to an exposé documenting "shocking abuses in some segments of the non-[federally]-regulated meat industry." Nick Kotz, *Ask Tighter Law on Meat Inspections for Products Sold Within States*, Des Moines Sunday Register, Jul. 16, 1967, at p. 1, 4. The 1967 law was directly aimed at Congress's recognition that "*Federal* standards must be required of all meat and meat food products," unlike the disparate, or non-existent state inspection schemes then governing the intrastate meat industry. Senate Committee on Agriculture and Forestry, Wholesome Meat Act of 1967, S. Rep. No. 799 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2188, 2190-91 (emphasis added). Accordingly, the Act created a program, under Title III, for "Federal and State Cooperation," to enact requirements for intrastate slaughtering operations "at least equal to those" applicable to federally-inspected slaughterhouses under Title I of the Act. Section 15, 81 Stat. at 595-97 (codified at 21 U.S.C. § 661). The 1967 Act simultaneously tightened federal standards over those interstate slaughterhouses

already subject to federal inspection under Title I by making ante-mortem inspection of livestock to be slaughtered for meat mandatory,[2] and by making expressly clear that federal law provides the sole standards for those slaughterhouses' operations, 21 U.S.C. § 678 (Section 408 of the 1967 Act).

With respect to this preemption provision, Congress clearly set forth its intent that federal requirements exclusively govern federally-inspected slaughterhouses by providing, in relevant part, that:

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

21 U.S.C. § 678 (emphasis added).[3] Consistent with the 1967 Act's intent to create complete uniformity of inspection, "Section 408 [the express preemption provision] would exclude States . . . from regulating operations at plants inspected under title I." House

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[2] The Wholesome Meat Act eliminated the Secretary's ability to act "at his discretion," instead requiring that "the Secretary *shall* cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species. . . ." 21 U.S.C. § 603(a) (as amended by Section 3, 81 Stat. at 588) (emphasis added).

[3] Section 678 is reproduced in its entirety in Appendix E. Pet. App. 63a.

Committee on Agriculture, Wholesome Meat Act of 1967, H.R. Rep. No. 653, at 27 (1967); Senate Committee on Agriculture and Forestry, Wholesome Meat Act of 1967, S. Rep. No. 799 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2188, 2207 (same); *see also* H.R. Rep. No. 653, at 7 ("States would be prohibited from regulating federally inspected plants whose operations are governed by title I."). This standard is reinforced by the clause's further provision that, where states wish to pass requirements or take other actions regarding "any other matters regulated under this chapter" not covered by the express preemption clause, they must still be "consistent with" federal requirements. 21 U.S.C. § 678.

The FMIA, as amended by the 1967 Act, mandates federal ante-mortem inspection of livestock before slaughter for meat. 21 U.S.C. § 603(a). It also regulates all other federally-inspected slaughterhouse operations, under comprehensive federal regulations administered by the Food Safety and Inspection Service ("FSIS").[4] For example, in 1978, Congress amended the FMIA by passing the Humane Methods of Slaughter Act to ensure that all livestock on slaughterhouse grounds be handled and slaughtered "in accordance with humane methods." Pub. L. No.

[4] FSIS's regulatory authority pursuant to the FMIA is not in dispute in this case, and it is agreed that the regulations promulgated pursuant to the Act bear the same preemptive force as the statute itself. *See Rath Packing*, 430 U.S. at 522-32 (considering federal regulations in preemption analysis).

95-445; 92 Stat. 1069 (1978). Similarly, the FMIA also regulates marking, labeling, packaging, and ingredient requirements both within and beyond the slaughterhouses' walls, as this Court addressed in *Rath Packing*.

This suit involves the inspection of livestock, specifically swine, that are or become nonambulatory[5] while on federally-inspected slaughterhouse grounds. Federal regulations require that such "downer" livestock, other than cattle,[6] that are "disabled" or "unable to move" be separated, 9 C.F.R. § 313.2(d)(1), and taken to a covered pen and held for further inspection

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[5] The federal regulations define "non-ambulatory disabled livestock" as "livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions." 9 C.F.R. § 309.2(b).

[6] Nonambulatory cattle are subject to different federal regulations because a cow's inability to walk is one symptom of bovine spongiform encephalopathy, commonly referred to as BSE or "mad cow disease," making the meat from that animal unsafe for human consumption. Such dangers, however, do not present themselves in pigs. *See* Court of Appeals Excerpts of Record (*hereinafter* "C.A.App.") 882 (Masters Decl.¶¶ 4-5). Indeed, there is no evidence that the consumption of meat or meat products from nonambulatory swine at a federally-inspected facility has ever caused or even poses a risk of causing a human health concern. C.A.App. 135-39 (Masters Suppl. Decl. ¶¶ 2-10). Rather, pigs that are nonambulatory upon arrival at federally-inspected slaughterhouses, or become so while kept in a holding pen, are often merely fatigued, stubborn, over-heated, or stressed, and in many cases are able to stand and walk after rest and supervision. C.A.App. 885, 886 (Terrill Decl. ¶¶ 5, 8).

by federally-regulated inspectors, 9 C.F.R. § 313.1(c), where they will either be identified as U.S. Suspects, 9 C.F.R. § 309.2(b), and passed for slaughter and human consumption if found to be safe, 9 C.F.R. § 311.1(a), or otherwise classed as condemned, 9 C.F.R. §§ 309.2(b), 309.3, and humanely euthanized, 9 C.F.R. § 309.13(a), Part 313. Moreover, because federal regulations attach as soon as a vehicle enters slaughterhouse premises, 9 C.F.R. § 302.3, if livestock are discovered to be nonambulatory upon arrival, federal inspection personnel may instead enter the transport vehicle itself and perform ante-mortem inspection there. FSIS Directive 6900.1, Rev. 1, Part One (III), (VI)(B), *available at* http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/6900.1Rev1.pdf (last visited Aug. 10, 2010).

This systematic ante-mortem inspection required under the FMIA serves a critical role in animal disease control, whereby early onsite detection of certain serious communicable diseases by federal veterinarians (or the inspectors they supervise) triggers such emergency measures as segregation or quarantine of the entire lot of livestock and notification of higher officials. *See, e.g.,* 9 C.F.R. § 309.5 (swine with hog cholera); 9 C.F.R. § 309.15 (vesicular disease); FSIS Directive 6000.1, Rev. 1, Part VI & VII, *available at* http://www.fsis.usda.gov/OPPDE/

rdad/FSISDirectives/6000.1Rev1.pdf (last visited Aug 10, 2010).[7]

B. California's Regulation of Federally-Inspected Slaughterhouses

In 2008, the State of California amended California Penal Code § 599f so as to supersede federal regulations concerning the handling and slaughter of nonambulatory livestock on federally-inspected slaughterhouse grounds. In response to an incident involving the abuse of nonambulatory *cattle* at a federally-inspected slaughterhouse in California, the state enacted an amendment to apply to *all* livestock because, according to the bill's primary sponsor, "California cannot allow unscrupulous slaughterhouse operators to endanger the safety of America's food supply and engage in grotesquely cruel practices." Assemblymember Paul Krekorian, *Krekorian Bill*

[7] This directive specifically addresses the responsibilities Public Health Veterinarians (PHVs) at federally-inspected slaughterhouses have with respect to foreign animal diseases (FADs). FSIS Directive 6000.1, Rev. 1, at Part I. "If inspection program personnel observe" certain "signs or symptoms," including "sudden lameness" ante-mortem, "an FAD should be considered." *Id.* at Part VI. PHVs are then instructed "to consider animals that are exhibiting these signs or symptoms . . . as 'U.S. Suspects' or 'U.S. Condemned' as appropriate under the meat . . . regulations[;] . . . notify the DO [District Office] as soon as possible when they suspect that any undiagnosed or unusual disease condition is reportable, foreign, or both . . . [; and] provide [certain specified] information, if available, to the DO." *Id.* at Part VII.

to Protect Meat Safety Signed Into Law by Governor, Press Release (Jul. 24, 2008) (C.A.App. 289). The resulting law barred all slaughterhouses from receiving, processing, butchering, or selling the meat of nonambulatory livestock of any kind for human consumption, and criminalized the holding of any animal which is or becomes nonambulatory without immediately euthanizing it. Cal. Penal Code §§ 599f(a)-(c), (h).[8]

Nonambulatory pigs that are immediately euthanized by slaughterhouse employees, as required by section 599f(c), cannot be "separated," and held for "disposition by [federal] inspector[s]," as required under 9 C.F.R. §§ 313.2(d)(1),and 313.1(c), to determine whether they are truly sick, whether any sickness is communicable to other animals or humans, and what actions (such as herd quarantine) are to be taken to contain any communicable disease. Thus, Section 599f eliminates the systematic ante-mortem inspection by federal veterinarians of nonambulatory animals required by the FMIA, greatly increasing the risk that serious communicable diseases will not be timely detected or addressed.

[8] California Penal Code § 599f, as amended, is set forth in its entirety at Appendix G. Pet. App. 72a.

C. The Federal Government's Express Rejection of California's Requirements

FSIS conducted its own review of the events at the cattle slaughterhouse in question, which "highlighted a vulnerability in [the federal] inspection system and . . . disclosed instances where cattle had been inhumanely handled." Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11463, 11463 (Mar. 18, 2009). Accordingly, after careful consideration, FSIS determined a targeted response was appropriate, issuing a proposed rule banning only the slaughter of nonambulatory cattle for human consumption.[9] FSIS expressly considered the requirements encapsulated in California's amended law and specifically rejected "extend[ing] the ban to cover all [nonambulatory] livestock," or "recommend[ing] that non-ambulatory disabled cattle be immediately euthanized" without further observation and inspection. *Id.* at 11464.

D. Proceedings Below

After the California legislature amended Section 599f but before that law went into effect, NMA filed suit against the California Attorney General, the

[9] As the record reflects, the federal government limited its response to nonambulatory cattle for good reason, since there is no record evidence of similar human health concerns with respect to nonambulatory swine. *See supra*, note 6.

Governor of California, and the State of California in the United States District Court for the Eastern District of California, seeking preliminary and permanent injunctive relief and a declaration barring the application of Section 599f, as amended, to federally-inspected swine slaughterhouses in the State of California on preemption, vagueness, and commerce clause grounds. Soon after NMA brought suit, other parties intervened in the action. The American Meat Institute intervened as a plaintiff, raising similar claims to NMA's but with respect to all livestock (not just swine), and pursuing only permanent, and not preliminary, injunctive relief. Additionally, the Humane Society of the United States and other interest groups intervened as defendants.

On February 19, 2009, the district court granted NMA's Motion for Preliminary Injunction, on the basis that the FMIA preempted Section 599f.[10] The court observed that "Section 599f alters the process and methods for the receipt of animals, the determination of the animal as 'disabled' or 'nonambulatory,' and also alters the subsequent handling of the nonambulatory animal," and as such, "impermissibly 'differs from' and is [in] 'addition to' the FMIA," in contravention of the Act's express preemption clause. Pet. App. 36a-37a, 40a.

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[10] NMA's other constitutional claims were not addressed by the district court, and as the Ninth Circuit observed, "[t]he district court didn't reach the dormant commerce clause and vagueness claims. Neither do we." Pet. App. 6a n.2.

On appeal, the Ninth Circuit vacated the injunction. In doing so, it departed from its own precedent as well as that of both this Court and the Sixth Circuit, which had held that Congress had "unmistakably ordained" the preemption of state law by the FMIA, which was not to be confined to a "restrictive meaning." *See Rath Packing*, *supra*, 430 U.S. at 525, 532, *affirming Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1976); *Armour & Co. v. Ball*, 468 F.2d 76, 83-84 (6th Cir. 1972). Without mention or analysis of such precedent, the Ninth Circuit held instead that this Court's decision in *Wyeth, supra*, mandated the invocation of a "presumption against preemption," requiring the court to give a "narrow interpretation" to the FMIA's express preemption language. Pet. App. 7a-8a.

Applying this "narrow interpretation," the Ninth Circuit held that Section 599f(a)-(c) was not expressly preempted, Pet. App. 7a-11a, doing so as a matter of law, *id.* at 11a ("There is no express preemption here."), on the basis that: "Section 678 preempts state regulation of the 'premises, facilities and operations' of slaughterhouses, and Section 599f(a)-(c) deals with none of these." *Id.* at 9a. Instead, the court reasoned that the California law permissibly "regulates the *kind of animal* that may be slaughtered," *id.* (emphasis added), drawing upon two recent decisions from the Fifth and Seventh Circuits holding that state bans on the sale of horsemeat for human consumption are not preempted because the FMIA "in no way limits states in their ability to regulate what *types of*

meat may be sold for human consumption in the first place." *Id.* (citing *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2950 (2008), and *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326 (5th Cir. 2007), *cert. denied*, 550 U.S. 957 (2007); quoting *Empacadora*, 476 F.3d at 333) (emphasis added). While the district court found those cases non-dispositive, because "[a] nonambulatory pig is not a 'type of meat,'" Pet. App. 39a, the Ninth Circuit dismissed the district court's reasoning as "hogwash," Pet. App. 10a. Instead, the Ninth Circuit recast the Fifth and Seventh Circuits' "type of meat" distinction, which permitted states simply to prohibit a certain species of livestock from ever entering federally-inspected slaughterhouse grounds for slaughter, into one countenancing state regulation of the "kind of animal" to be slaughtered, and then, unlike the horsemeat laws, allowed the state to regulate which *individual* animals (of a kind – here, pigs – otherwise permissible for slaughter under state law) may be slaughtered based upon a mutable characteristic (nonambulation) often exhibiting itself only after that particular animal is already on federally-inspected premises. The Ninth Circuit made no reference to the federal government's explicit rejection of the very requirements enacted by California, instead concluding: "California's prohibition on the slaughter of nonambulatory animals does not duplicate federal procedures; it withdraws from slaughter animals that are unable to walk to their death. This prohibition doesn't require *any* additional or different inspection than does the FMIA, and is

thus not a regulation of the 'premises, facilities and operations' of slaughterhouses." Pet. App. 11a (emphasis in original).[11]

While the Ninth Circuit vacated the preliminary injunction and denied rehearing of its decision, it did grant NMA's motion to stay the mandate pending certiorari. Thus, notwithstanding its holding on the merits, the Ninth Circuit has temporarily maintained the status quo – the supremacy of federal law regarding federally-inspected slaughterhouses – while NMA petitions this Court to review the Ninth Circuit's ruling on the FMIA express preemption claim.

[11] In contrast, the Ninth Circuit did find that Cal. Penal Code § 599f(e), which prohibits slaughterhouses from dragging or pushing nonambulatory animals "at any time," was a regulation of the "premises, facilities and operations" "different than" federal law, which only prohibits such animals from being dragged "while conscious" and permits the dragging of "stunned animals," 9 C.F.R. § 313.2(d)(2). Pet. App. 15a-16a. While the Ninth Circuit found NMA "likely to succeed on its express preemption claim against section 599f(e)," it remanded for more sufficient findings concerning irreparable harm and the balance of the equities with respect to this specific provision. *Id.* at 16a-17a. The Ninth Circuit observed, in its conclusion, that "[n]othing we say here precludes the entry of a preliminary injunction as to section 599f(e) after appropriate findings are made, or a preliminary injunction as to the entirety of section 599f based on other legal theories." *Id.* at 17a. Its ruling that there is no express preemption of Section 599f(a)-(c), however, was definitive, and not open on remand.

REASONS FOR GRANTING THE PETITION

In *Rath Packing*, this Court "clearly laid out the path [courts] must follow" in determining whether Section 678 of the FMIA preempts state law. 430 U.S. at 525. While acknowledging the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), this Court held that the FMIA was a specific example of "when Congress has 'unmistakably . . . ordained' that its enactments alone are to regulate a part of commerce, [in which case] state laws regulating that aspect of commerce must fall." *Id.* (internal citation omitted).

Notwithstanding this binding precedent concerning the "broad meaning" of the FMIA's preemption provisions, *id*. at 540, the Ninth Circuit determined on its own that the "presumption against preemption" mandated a "narrow interpretation" of the FMIA's preemption clause. Pet. App. 8a. The Ninth Circuit's decision thus squarely conflicts with this Court's precedent, as well as other appellate courts' interpretation of the FMIA. *See, e.g, Armour*, 468 F.2d at 84 ("Congress has 'unmistakably . . . ordained' that the Federal [Meat Inspection] Act fixes the sole standards.").[12]

[12] The California Court of Appeals recently explicitly rejected an argument that a term in Section 678's express

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The Ninth Circuit's departure from *Rath Packing* is rooted in its erroneous invocation and understanding of this Court's jurisprudence concerning the presumption against preemption. *See* Pet. App. 7a, 8a. While it should have simply followed *Rath Packing* here unless and until this Court ruled otherwise, the Ninth Circuit's confusion over the role of the presumption against preemption shows the effect on the lower courts of the "ongoing disagreement" among members of this Court "as to if, when, and how this presumption applies." *Demahy*, 593 F.3d at 434.

It is critical that this Court address these issues now, at this stage of the case. The status quo – the supremacy of uniform federal law under the FMIA – has thus far been maintained, notwithstanding the Ninth Circuit's decision on the merits, only because the Ninth Circuit has stayed its mandate pending this Court's review. This will no longer be true, of course, if this Court denies certiorari until after the remainder of the case is resolved. The Ninth Circuit's ruling that there is no express preemption was made as a matter of law, and is not open on remand. What will change if review is not granted now is that a State, for the first time, will be allowed to impose,

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preemption language be "narrowly interpreted" for preemption purposes, and the California Supreme Court notably denied review of that decision even *after* the Ninth Circuit's opinion in this case had issued. *Am. Meat Institute v. Leeman*, 102 Cal. Rptr. 3d 759, 781 (Cal. Ct. App. 2009), *review denied* (Cal. Apr. 14, 2010).

piece by piece, its own additional and different regulations with respect to how federally-inspected slaughterhouses are to conduct handling, inspection, and slaughtering operations on their premises. In the present case, these State requirements would, in effect, preempt federal regulations providing for the separation, inspection, and slaughter of non-ambulatory swine and eliminate for those animals the federal ante-mortem inspection process which plays a central role in the early detection of serious communicable diseases. The gap in the federal animal health safety net which would be created by the California law would bring with it the risk of dangerous consequences for animal and public health. For all these reasons, as discussed below, this Court should grant review, and should do so now.

I. THE NINTH CIRCUIT'S DETERMINATION THAT THE PRESUMPTION AGAINST PREEMPTION TRUMPS THE PLAIN TERMS OF THE FMIA'S EXPRESS PREEMPTION CLAUSE CONFLICTS WITH *RATH PACKING* AND THIS COURT'S PREEMPTION JURISPRUDENCE

When this Court examined the FMIA's preemptive scope, it held that "th[e] explicit pre-emption provision dictates the result in th[is] controversy." *Rath Packing*, 430 U.S. at 530-31. It came to this conclusion because it determined that there is a "clearly laid . . . path" that "must [be] follow[ed] to answer this question" of FMIA preemption. *Id.* at

525. As this Court explained, while it is of course important to recognize the role States have historically played, that is only the beginning of the inquiry. Where, as with the FMIA, Congress has used its power to legislate in a field otherwise "traditionally occupied by the States, 'we *start* with the assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless* that was the clear and manifest purpose of Congress.'" *Id.* (internal citations omitted; quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230) (emphasis added).

The Ninth Circuit followed the first step, observing that a "presumption against preemption" exists in areas of historical state regulation, but paid no heed to what this Court said must follow, with specific regard to the FMIA: "But when Congress has 'unmistakably . . . ordained' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." *Id.* (internal citation omitted). The guiding principle, this Court made clear, is that "this result" – the preemption of state law – is "*compelled* [when] Congress' command is *explicitly stated in the statute's language.*" *Id.* (internal citations omitted) (emphasis added).

What this Court found to be "explicitly stated in the [FMIA's] language" was a preemption provision intended to be given "a broad meaning," *id.* at 540 (comparing the FMIA to the narrower preemption language of the Fair Packaging and Labeling Act ("FPLA"), 15 U.S.C. § 1461) – a view of the Act wholly at odds with the "narrow interpretation" the Ninth

Circuit now feels it "must give this provision" based upon the presumption against preemption, Pet. App. 8a. Indeed, in *Rath Packing* this Court not only stated the applicable principles for FMIA preemption, it instructively applied them: It gave full force to the FMIA's plain language prohibiting state laws "'in addition to, or different than, those made under' the Act,"[13] and engaged in a careful parsing of California's labeling requirements as compared with those found under the FMIA. 430 U.S. at 526-32 and accompanying notes. In the process, the Court made clear that preempted "differences" extend even to minute distinctions between state and federal standards.[14]

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[13] *Rath Packing* directly involved Section 678's parallel, identically-worded preemption language providing that: "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. In rendering its decision, the Court took the full preemption clause, including the language at issue here, into account. *Rath Packing,* 430 U.S. at 530 n.17.

[14] At issue in *Rath Packing* were weight labels for bacon, where the net weights on the label would often differ from the actual weight of the bacon due to bacon's loss of moisture to its wrapping materials and the atmosphere, as well as the fact that "since bacon is cut in discrete slices, it is impossible to guarantee that each package will contain exactly the stated weight when packed." *Rath Packing*, 430 U.S. at 530 n.16. This Court carefully studied the statistical sampling methods employed by the State of California, *see id.* at 531 n.18, and methods of measuring the weight of the packaging material with respect to moisture loss, *see id.* at 527 n.10, in holding that "the state law's requirement – that the label accurately state the net weight, with implicit allowance only for reasonable manufacturing

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Here, any doubt that California's law is "different than" the FMIA was settled when the federal government expressly considered the very requirements contained in Section 599f – barring the slaughter of all nonambulatory animals and instead requiring their immediate euthanization without further inspection – and expressly rejected them. 74 Fed. Reg. at 11464; *compare with* Cal. Penal Code §§ 599f(b)&(c). Yet the Ninth Circuit nonetheless concluded the opposite, reasoning that, because California law "doesn't require *any* additional or different inspections than does the FMIA, [it] is thus not a regulation of the 'premises, facilities and operations' of slaughterhouses." Pet. App. 11a (emphasis in original). That premise – that California law "doesn't require any additional or different inspections than does the FMIA" – is both wrong (requiring "immediate action to humanely euthanize the animal" *without* inspection is certainly different than requiring an antemortem inspection) and misfocused, because the plain terms of Section 678 do not use the term "inspections" at all; instead, they provide for the much broader preemption of *any* State "requirements . . . with respect to premises, facilities and operations" of a federally-regulated slaughterhouse "which are in addition to, or different than those made under this chapter."

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variations – is 'different than' the federal requirement, which permits manufacturing deviations and variations caused by moisture loss during good distribution practice," *id.* at 531-32.

This error came about, in part, because the Ninth Circuit reversed this Court's two-step process for analyzing preemption clauses barring "different" or "additional" state requirements. Under that process, a court first "must determine whether the Federal Government has established requirements applicable to" the subject – in this case, the handling of non-ambulatory swine – and only then "determine whether . . . [the State law] requirements with respect to [the handling of nonambulatory swine] are 'different from, or in addition to' the federal ones." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 321-22 (2008). When California's law is properly reviewed under this two-step inquiry, its preemption is clear. The FMIA and its implementing regulations expressly and comprehensively govern slaughterhouse "operations" concerning nonambulatory swine from the moment they arrive at or become nonambulatory on federally-inspected slaughterhouse "premises." California's law is "different than" the federal requirements, and is thus plainly not "equivalent to, and fully consistent with" the FMIA, as is required to avoid preemption under Section 678. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447 (2005) (defining "in addition to or different from").

In order to save the state law from preemption, the Ninth Circuit had to say, in effect, that a state law regulating what a slaughterhouse must do on its premises does not regulate slaughterhouse premises or operations. This is fundamentally wrong, as *Rath Packing* again makes clear. In that case, the

petitioner was faced with the same conclusion that "the state law's requirement . . . is 'different than' the federal requirement," and it "[sought] to avoid this result by arguing that the FMIA's provisions governing the accuracy of the required net-quantity statements are not 'labeling requirements' within the meaning of section 408." *Rath Packing*, 430 U.S. at 531-32. This Court, however, expressly rejected "the restrictive meaning . . . ascribe[d]" to such "requirements." *Id.* at 532; *accord Lewis*, 235 U.S. at 286 ("We are unable to discern any sufficient reason for giving to the language of the [FMIA] so limited an application."). As this Court held in *Rath Packing*, "It twists the language beyond the breaking point to say that a law mandating that labeling contain certain information is not a 'labeling requirement.'" *Rath Packing*, 430 U.S. at 532. So too here: to say that a law mandating how nonambulatory swine are to be handled on slaughterhouse premises is not a "requirement[] . . . with respect to premises, facilities and operations" likewise "twists the language beyond the breaking point" and cannot save the state law from preemption.

This Court's decision in *Rath Packing* thus makes clear that California Penal Code § 599f must give way to the express preemptive language in the FMIA. This Court has also made clear that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this

Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Rather than engaging in its own application of the presumption against preemption, the Ninth Circuit should have followed *Rath Packing*, and its square conflict with that decision is an important ground for granting review.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONTINUING CONFUSION AS TO IF, WHEN, AND HOW A PRESUMPTION AGAINST PREEMPTION APPLIES TO EXPRESS PREEMPTION PROVISIONS

The Ninth Circuit's failure to follow *Rath Packing* was premised on its understanding of a line of decisions of this Court invoking the presumption against preemption in other contexts. Pet. App. 7a-8a. It cited footnote 3 of *Wyeth* in particular, and also invoked its prior decision in *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005), where, over a dissent, *id*. at 505, the court had applied the presumption against preemption to an express preemption clause based on its understanding of this Court's decisions in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), *United States v.*

Locke, 529 U.S. 89, 108 (2000), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).[15]

This reasoning by the Ninth Circuit was doubly defective. It not only failed to follow *Rath Packing*, but also failed to understand that, where Congress has used the type of express preemption language found in the FMIA, no presumption *against* preemption comes into play at all. That the Ninth Circuit nonetheless thought *Wyeth* and other decisions of this Court invoking the presumption controlled is indicative of the sort of confusion among the lower courts that only this Court can clarify.

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[15] The Ninth Circuit also erred in saying its "narrow interpretation" of Section 678 was all the "more so" required by the fact that Section 678 has a provision which allows states to pass requirements or take other actions regarding "any other matters regulated under this chapter" not covered by the express preemption clause, as long as they are "consistent with" federal requirements. Pet. App. 8a-9a. The Ninth Circuit said this provision "preserves for the states broad authority to regulate slaughterhouses." *Id.* at 8a. But that same provision was in Section 678 when this Court reviewed it in *Rath Packing*, *see* 430 U.S. at 530 n.17, and it did not alter this Court's holding. Moreover, this Court has said courts should "decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106. And this Court has granted review in *Chamber of Commerce v. Candelaria*, No. 09-115, 78 U.S.L.W. 3762 (cert. granted June 28, 2010), in part to review the Ninth Circuit's use in that case of a saving clause to override an express preemption provision (in that case, provisions of the Immigration Reform and Control Act of 1986 found at 8 U.S.C. § 1324a(h)(2)).

The question of when a presumption against preemption should apply has been a topic of recent and repeated debate within this Court. *See generally Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543-49 (2008); *id*. at 555-58 (Thomas, J., dissenting) (describing ongoing debate in the Court on this issue). That debate has included the role which any presumption against preemption should properly play in interpreting express preemption clauses. *See, e.g., id*. And that debate has not been resolved: Whereas in *Altria* the majority *applied* a presumption against preemption (drawn from the plurality opinion in *Cipollone*) to an express preemption clause (in the Federal Cigarette Labeling and Advertising Act), *id.* at 549, in *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009), all Justices, whether members of the majority or dissent, concurred that a presumption against preemption *did not apply* to the plain terms of the preemption clause at issue there. *Cuomo*, 129 S. Ct. at 2720 ("We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act."); *id.* at 2732 (Thomas, J., concurring in part and dissenting in part: "There should be no presumption against pre-emption because Congress has expressly pre-empted state law in this case.").

This Court's "ongoing disagreement . . . as to if, when, and how this presumption applies," *Demahy*, 593 F.3d at 434, has left the lower courts in ongoing confusion. Some federal appellate courts assert the presumption against preemption always applies in

express preemption analysis. *See, e.g., Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) (*en banc*) ("The presumption is relevant even when there is an express pre-emption clause."); *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1060 (9th Cir. 2009) ("This presumption against preemption leads us to the principle that express preemption statutory provisions should be given a narrow interpretation." (quoting *Air Conditioning & Refrigeration Inst.*, 410 F.3d at 496)). Others recognize the presumption's existence, but limit its reach. *See, e.g., N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009) (recognizing "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," but finding the presumption to be of no force given that the federal act in question "is clear on preemption"), and *Smith v. CSX Transp., Inc.*, No. 09-16080, 2010 U.S. App. LEXIS 11351, at *3 (11th Cir. June 3, 2010) ("the presumption against preemption dissipates when the intention of Congress is 'clear and manifest'"). And sometimes it is wholly ignored. *E.g.*, *Chae v. SLM Corp.*, 593 F.3d 936, 942, 944 (9th Cir. 2010) (stating "[w]e use the text of the provision, the surrounding statutory framework, and Congress' stated purpose in enacting the statute to determine the proper scope of an express preemption provision," and invoking the presumption against preemption only in its conflict preemption analysis).

Needless to say, only this Court can resolve this confusion. That this confusion has contaminated the analysis of an express preemption clause as "clear and manifest" as that in the FMIA, where Congress has "unmistakably ordained" that the FMIA alone is to regulate handling and inspection, shows the time for this Court to act, is, respectfully, now.[16]

III. THE IMMEDIATE RISK TO ANIMAL AND HUMAN HEALTH AND SAFETY CREATED BY THE CALIFORNIA LAW COUNSELS IMMEDIATE REVIEW

Serious public health concerns raised by state law displacement of the FMIA's uniform and systematic inspection regime also counsel for this Court's review now. Under the FMIA, federal inspection program personnel inspect pigs that become nonambulatory to determine which are truly sick and present a risk to human or animal health, and which are merely fatigued and perfectly suitable for slaughter and consumption. *See* 9 C.F.R. § 309.2(b). Federal ante-mortem inspection is the process for the detection of, among other things, certain serious communicable porcine diseases. Emergency measures, such as segregation or quarantine of the entire lot of

[16] This Court's grant of certiorari in No. 09-152, *Bruesewitz v. Wyeth, Inc.*, 130 S. Ct. 1734 (cert. granted March 8, 2010), may present an occasion to address some aspects of the presumption against preemption, but will involve a very different preemption clause. *Compare* 21 U.S.C. § 678 *with* 42 U.S.C. § 300aa-22.

livestock, and the notification of higher officials, are triggered by early onsite detection of such diseases by federal veterinarians (or the inspectors they supervise) during ante-mortem inspection. *See, e.g.,* 9 C.F.R. § 309.5 (swine with hog cholera); 9 C.F.R. § 309.15 (vesicular disease).

Under the California law, however, "no slaughterhouse shall hold a nonambulatory animal," and must instead "take immediate action to . . . euthanize the animal." Cal. Penal Code § 599f(c). This will prohibit federal veterinarians and inspectors from holding for ante-mortem inspection any pig "unable to stand and walk without assistance," Section 599f(i), including any pigs afflicted with one of the above diseases, some of the symptoms of which, such as elevated temperature for certain vesicular diseases, *see* 9 C.F.R. § 309.15(b), are not measurable on animals post-mortem. Even for those diseases which can be detected post-mortem, emergency response actions such as segregation or quarantine will be significantly delayed.

Similarly, Section 599f(a)'s ban on the mere receipt of nonambulatory animals will require swine slaughterhouses to change their federally-sanctioned procedures for accepting swine. Slaughterhouses will no longer be able to hold, inspect, and if necessary humanely euthanize swine found to be nonambulatory upon arrival in a truck. Instead, animal suffering and the possible spread of communicable diseases will be exacerbated because such pigs may not be "receive[d]" under Section 599f(a), and will

instead have to remain on the vehicle to be transported to some other destination (if one exists) where they can be received under California law. *See* C.A.App. 886 (Terrill Decl. ¶ 7).

The California law thus destroys the uniform, systematized process by which federal public health veterinarians screen nonambulatory animals for diseases prior to slaughter, and – turning federal preemption on its head – criminalizes the actions of slaughterhouse operators who obey federal regulations with respect to the handling of nonambulatory swine. Addressing this issue now is particularly important. Other states, such as Washington and New York, have also passed or have pending similar bills purporting to regulate slaughterhouse actions towards nonambulatory livestock on slaughterhouse premises. Wash. Rev. Code § 16.52.225 (gross misdemeanor for a person to "knowingly . . . accept delivery of live nonambulatory livestock to, from, or between any livestock market, feedlot, slaughtering facility, or similar facility"; rather "[n]onambulatory livestock must be humanely euthanized before transport to, from, or between locations [already] listed"); Wash. Rev. Code § 16.36.116 (civil infraction for "[a]ny person who knowingly transports or accepts delivery of live nonambulatory livestock to, from, or between any livestock market, feedlot, slaughtering facility, or similar facility"); State Assemb. A05512, 2009-2010 Reg. Sess. (N.Y. 2009) (Summary: A bill that "[p]rohibits . . . holding . . . [or] receiving . . . a nonambulatory animal unless such animal is first

humanely euthanized without undue delay"; same as S 751). These laws in general, and California's in particular, give rise to serious public health concerns if their displacement of the FMIA is allowed to stand.

IV. THE NINTH CIRCUIT'S RADICAL EXPANSION OF THE "HORSEMEAT" CASES SERIOUSLY IMPACTS FMIA PREEMPTION

Review of the Ninth Circuit's opinion is also warranted by its radical expansion of recent cases which have allowed states to regulate "the types of meat that can be sold for human consumption" without running afoul of the FMIA. *Empacadora*, 476 F.3d at 333. The Fifth and Seventh Circuits grounded their decisions on the principle that, "[if] horse meat is produced for human consumption, its production must comply with the Meat Inspection Act. But if it is not [so] produced, there is nothing, so far as horse meat is concerned, for the Act to work upon." *Cavel*, 500 F.3d at 554. In other words, where states have horsemeat bans, such animals are never allowed to enter federally-regulated slaughterhouse premises for slaughter, and such laws thus do not in any way alter the federal rules governing what is to occur *inside* those establishments. *See id*. Such state laws do not regulate *which* horses on federally-regulated premises may be subject to ante-mortem inspection and suitable for slaughter; they ban *all* horses from even entering the federal premises at all.

Unlike the horsemeat laws, however, California's statute encroaches upon precisely what the FMIA "is more naturally read as being concerned with[:] the methods . . . that slaughterhouses use" on their premises. *Empacadora*, 476 F.3d at 333. This is because the Ninth Circuit's attempt to broaden the "type of meat" distinction so as to also extend to a State's ability to regulate the "kind of animal" that may be slaughtered, Pet. App. 9a-11a, ignores that the State here has chosen to regulate a mutable characteristic often exhibiting itself in particular animals of a kind otherwise suitable for slaughter only after those animals are already on federally-regulated slaughterhouse grounds. *See supra* n.6. Indeed, the Ninth Circuit itself strained against this categorization, cautioning that "state[s] may try to establish stricter inspection standards, and style the new standards as a regulation of the 'kind of animal' that may be slaughtered," Pet. App. 11a, while failing to acknowledge that this is *precisely* what the State of California has done in this case. Nonetheless, while a horse is always a horse, a pig is not always nonambulatory, and it may well first become so only after entering the slaughterhouse premises. Congress has made clear, however, that once on federally-regulated slaughterhouse grounds, federal law is to set the sole standards. 21 U.S.C. § 678; *see Rath Packing*, 430 U.S. at 525, 532; *Armour*, 468 F.2d at 84. Allowing Section 599f to stand as it relates to swine thus violates the FMIA's preemptive scope, given the need for uniformity "lest meat providers be forced to master various separate operating

techniques to abide by conflicting state laws," *Empacadora*, 476 F.3d at 334, as would be the case here.

V. THIS CASE, IN ITS CURRENT POSTURE, IS A GOOD VEHICLE FOR RESOLVING THESE IMPORTANT ISSUES

The issues presented by this case are important, and this suit, in its present procedural posture, is a particularly good vehicle for taking up these questions. First, the fundamental tension between the "narrow interpretation" the Ninth Circuit has said the presumption against preemption demands, in contrast with the "broad meaning" this Court has said the plain language of the FMIA's express preemption provision otherwise compels, allows this Court to explore the limits of the presumption's effect in a way that more restrained express preemption provisions (like that at issue in *Bruesewitz v. Wyeth Inc.*, No. 09-152) do not.

Furthermore, not only does the federal statute at issue make this a good vehicle for clarifying the presumption's proper place, but in this particular suit, the presumption was not only clearly invoked, it was dispositive of the express preemption issue. It was only because the Ninth Circuit believed it "must give the [FMIA's preemption] provision a narrow interpretation" that it contorted other circuits' "type of meat" distinction into a broad "kind of animal" category, allowing California law to regulate the

handling of *individual* animals already legally on slaughterhouse premises – precisely what Section 678 of the FMIA preempts. The effect of this decision is particularly acute, given the grave public health risks implicated by the displacement of federal ante-mortem inspection. By staying the mandate pending this petition for certiorari, the Ninth Circuit took the significant step of preserving the status quo (FMIA supremacy) to allow this Court to review the important issues presented in this case.

Finally, it is entirely appropriate for the Court to grant certiorari now, to review the Ninth Circuit's reversal of a preliminary injunction, as this Court has recently done with respect to another Ninth Circuit matter. *See Doe v. Reed*, 130 S. Ct. 2811, 177 L. Ed. 2d 493, 501 (2010) (granting certiorari of Ninth Circuit's reversal of district court's preliminary injunction, while other proceedings were still pending before the district court). Here, the express preemption ruling is a clear, definitive decision, made as a matter of law, not open to change on remand, on which *en banc* review by the circuit has been denied, and dispositive of the suit if preemption is found to exist. Moreover, unlike many other contexts, this issue should not be allowed to fester unresolved as other issues are tried, since it is at the preliminary injunction stage where "the rubber meets the road" in preemption matters – the point in time when the state is trying to take over, or take primacy in, a federally-regulated area. Indeed, if, as here, the express preemption provision of a federal law has not

on its own deterred the state from legislating in an area, a preliminary injunction is the very means by which express preemption must be enforced if the status quo of federal supremacy is not to be upset. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290 (1940) ("We hold that the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised. . . .").[17] This is of particular significance here, where, if California's law is allowed to go into effect, it would disrupt a uniform federal regime that has been in place for decades, and bring with it potentially grave consequences for both animal and public health. The Ninth Circuit's stay of the mandate pending this petition, which stay in effect preserved the preliminary injunction order the Ninth Circuit had just

[17] Similarly, it is no impediment to this Court's review of the Ninth Circuit's decision that one of the respondents has sought an administrative change in the FMIA regulations (on which FSIS has to date apparently taken no action). *See* Farm Sanctuary, Petition submitted to FSIS to amend 9 C.F.R. § 309.3(e) to prohibit the slaughter of non-ambulatory pigs, sheep, goats, and other livestock and to require that such animals be humanely euthanized (Mar. 15, 2010), *available at* http://www.fsis.usda.gov/regulations_&_policies/Petitions/index.asp (last visited Aug. 10, 2010). Unless and until the FSIS, the agency charged by Congress with implementing the FMIA, decides to change federal law, the express provisions of the FMIA preserve the status quo by preempting state law, and the Ninth Circuit's decision to the contrary here – which was based on its interpretation of the language of the preemption provision, which statutory language is of course not subject to change by the FSIS – merits review by this Court.

vacated, underscores the importance of the express preemption issues implicated in this suit, and shows that court's acknowledgment of the merit in having this Court fully resolve the express preemption question now, *before* the State law is allowed to be enforced against swine slaughterhouses. For all these reasons, this suit, in its present procedural posture, is a good vehicle for this Court to resolve the important preemption issues presented by this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 13, 2010

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL MEAT ASSOCIATION,
Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,
Plaintiff-intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,
Defendants-Appellants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,
Defendant-intervenors.

No. 09-15483

D.C. No. 1:08-cv-01963-LJO-DLB

NATIONAL MEAT ASSOCIATION,
Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,
Plaintiff-intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,
Defendants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,
Defendant-intervenors-Appellants.

No. 09-15486

D.C. No. 1:08-cv-01963-LJO-DLB

OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
August 11, 2009 – San Francisco, California

Filed March 31, 2010

Before: Alex Kozinski, Chief Judge, Stephen Reinhardt and Barry G. Silverman, Circuit Judges.

Opinion by Chief Judge Kozinski

COUNSEL

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Sarah L. Conant and Peter A. Brandt, The Humane Society of the United States, Washington, D.C.; and Bruce A. Wagman, Schiff Hardin LLP, San Francisco California, for the defendant-intervenor-appellants.

Steven J. Wells and Heather M. McCann, Dorsey & Whitney LLP, Minneapolis, Minnesota, for the plaintiff-appellee.

OPINION

KOZINSKI, Chief Judge:

This is an interlocutory appeal from a preliminary injunction prohibiting the enforcement of California Penal Code § 599f, which bans the slaughter and inhumane handling of nonambulatory animals, against federally regulated swine slaughterhouses.

I

On January 30, 2008, The Humane Society released a video depicting images of nonambulatory cows – cows that are unable to stand or walk without assistance – being kicked, electrocuted, dragged with chains and rammed with forklifts at California's Westland/Hallmark slaughterhouse. Footage also showed some workers trying to get nonambulatory cows to stand by spraying pressurized water into their noses to simulate drowning. Public health professionals warned that meat from these "downer" cows was more likely to be diseased, partly because animals can become nonambulatory due to disease and partly because downer animals grow sicker as they end up rolling around in other animals' refuse. The video triggered the largest beef recall in United States history.

California responded by amending California Penal Code § 599f to provide that:

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

> (e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

Cal. Pen. Code § 599f. Together these provisions: (1) ban the receipt and slaughter of downer animals, *id.* § 599f(a)-(c); and (2) require the humane handling of downer animals, *id.* § 599f(e).

Shortly before amended section 599f was to take effect, National Meat Association (NMA) – a trade association representing packers and processors of swine livestock and pork products – filed suit in federal district court against the State of California seeking declaratory and injunctive relief barring the application of section 599f to federally inspected swine slaughterhouses.[1] Some of its members claimed that section 599f would prevent the slaughter of approximately 2.5% of their pigs. NMA argued that section 599f is preempted by the Federal Meat Inspection Act (FMIA), violates the dormant commerce clause and is unconstitutionally vague. The district court entered a preliminary injunction on preemption

[1] American Meat Institute, a trade association which represents meat packagers and processors, intervened as a plaintiff but didn't seek preliminary relief.

grounds;[2] the State of California and defendant-intervenors The Humane Society, et al., who supported the bill amending section 599f, bring this interlocutory appeal.

II

We review for abuse of discretion and will reverse if the district court's decision is based on an erroneous legal standard or clearly erroneous finding of fact. *Stormans, Inc.* v. *Selecky,* 586 F.3d 1109, 1119 (9th Cir. 2009). Preemption is a legal issue we review de novo. *Am. Trucking Ass'ns* v. *City of L.A.,* 559 F.3d 1046, 1052 (9th Cir. 2009). Someone seeking a preliminary injunction must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).[3]

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[2] The district court didn't reach the dormant commerce clause and vagueness claims. Neither do we.

[3] The district court applied our pre-*Winter* "sliding scale" approach, which required only a "possibility of irreparable injury" if plaintiff is likely to succeed on the merits. *See Stormans,* 586 F.3d at 1126-27. In some instances, this error may require remand for application of the *Winter* standard. Here, however, the district court found that NMA is likely to succeed and faces a significant threat of irreparable injury, and that the balance of the equities and the public interest favors NMA. These findings

(Continued on following page)

Receipt and Slaughter Ban

Congress, as well as federal agencies, may expressly or impliedly preempt state law. *Barrientos* v. *1801-1825 Morton LLC,* 583 F.3d 1197, 1208 (9th Cir. 2009). There is express preemption where federal law explicitly preempts state law. *Altria Group, Inc.* v. *Good,* 129 S. Ct. 538, 543 (2008). There is implied preemption where federal law was intended to occupy the legislative field or where state law conflicts with federal law, either because it's impossible to comply with both laws or because state law stands as an obstacle to accomplishing the purposes of federal law. *See id.*; *English* v. *Gen. Elec. Co.,* 496 U.S. 72, 79 (1990). In either case, there's a strong presumption against preemption, especially when the state law deals with matters like health and animal welfare, which have historically been regulated by states. *See Wyeth* v. *Levine,* 129 S. Ct. 1187, 1194-95 n.3 (2009).

1. Express Preemption. NMA argues, and the district court held, that the FMIA expressly preempts section 599f's ban on the receipt and slaughter of nonambulatory animals. Under the FMIA, all animals are sent to federal inspection before they enter a slaughterhouse where they are to be slaughtered for meat capable of human consumption that will be sold in commerce. 21 U.S.C. § 603(a). Regulations pursuant to the FMIA require nonambulatory animals to be

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enable us to review the injunction under *Winter* without remanding for application of the new standard.

classified as "U.S. Suspect" and held for further examination. 9 C.F.R. § 309.2(b). If the downer animal shows signs of certain diseases upon inspection, it must be classified as "U.S. Condemned" and disposed of according to specific procedures. *See id.* §§ 309.4-309.18. But if the animal passes inspection, it may be slaughtered and sold for human consumption. *See generally id.* § 309.2.[4]

The FMIA contains an express preemption provision:

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

21 U.S.C. § 678 (emphasis added). Consistent with the presumption against preemption, we must give this provision a narrow interpretation. *See Air Cond. & Refrig. Inst.* v. *Energy Res. Conserv. & Dev. Comm'n,* 410 F.3d 492, 496 (9th Cir. 2005). More so because section 678 explicitly preserves for the states broad authority to regulate slaughterhouses: "This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with

[4] All nonambulatory cattle, however, must be classified as U.S. Condemned and may not be slaughtered for human consumption. *See* 9 C.F.R. § 309.3(e).

this chapter, with respect to any other matters regulated under this chapter." 21 U.S.C. § 678.

Starting, as we should, with the language of the statute, we find no express preemption. Section 678 preempts state regulation of the "premises, facilities and operations" of slaughterhouses, and section 599f(a)-(c) deals with none of these. Rather, it regulates the kind of animal that may be slaughtered. Two circuits have held that the FMIA doesn't preempt state laws that do precisely that. *Cavel Int'l, Inc.* v. *Madigan,* 500 F.3d 551 (7th Cir. 2007) (state ban on horse slaughter not preempted); *Empacadora de Carnes de Fresnillo* v. *Curry,* 476 F.3d 326 (5th Cir. 2007) (same). These cases explain that "[the FMIA] preemption clause expressly limits states in their ability to govern meat inspection and labeling requirements. It in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place." *Empacadora,* 476 F.3d at 333. "*Given* that horse meat is produced for human consumption, its production must comply with the [FMIA]. But if it is not produced, there is nothing, so far as horse meat is concerned, for the Act to work upon." *Cavel,* 500 F.3d at 554. This makes horse sense: Federal law may establish fireworks safety standards, but that doesn't preclude states from banning fireworks. Similarly, the FMIA establishes inspection procedures to ensure animals that are slaughtered are safe for human consumption, but this doesn't preclude states from banning the slaughter of certain kinds of animals altogether.

The district court sought to distinguish *Cavel* and *Empacadora*: "A nonambulatory pig is not a 'type of meat.' A pig is a pig. A pig that is laying down is a pig. A pig with three legs is a pig. A fatigued or diseased pig is a pig. Calling it something else does not change the type of meat produced." In effect, the district court reasoned that states may ban the slaughter of certain species, but once a state allows a species to be slaughtered, it cannot impose further restrictions. Hogwash.

States aren't limited to excluding animals from slaughter on a species-wide basis. What if a state wanted to ban the slaughter of a specific breed of pig but not the entire species? Or to allow wild dogs and horses to be slaughtered, but not domesticated companions? And what if, in response to a population problem, a state only banned the slaughter of female cattle? Or, perhaps due to ethical concerns, prohibited the slaughter of pregnant or newborn animals, or the slaughter of non-free-range animals? Regulating what kinds of animals may be slaughtered calls for a host of practical, moral and public health judgments that go far beyond those made in the FMIA. These are the kinds of judgments reserved to the states, and nothing in the FMIA requires states to make them on a species-wide basis or not at all. Federal law regulates the meat inspection process; states are free to decide which animals may be turned into meat.

It is possible that a state may go too far in regulating what "kind of animal" may be slaughtered. For example, a state may feel that federal inspection

standards for diamond-skin disease (9 C.F.R. § 311.6), arthritis (*id.* § 311.7) or sexual odor of swine (*id.* § 311.20) are too lenient. The state may try to establish stricter inspection standards, and style the new standards as a regulation of the "kind of animal" that may be slaughtered: "The kind of pig that tests positive under procedure X for sexual odor may not be slaughtered." Or enforcement of a state regulation of what "kind of animal" may be slaughtered might require certain inspections: "Pigs with arthritis may not be slaughtered. Slaughterhouses shall perform Y and Z procedures to screen for the condition." Such regulations could effectively establish a parallel state meat-inspection system.

We need not decide what limits the express preemption provision places on such regulations. California's prohibition of the slaughter of nonambulatory animals does not duplicate federal procedures; it withdraws from slaughter animals that are unable to walk to their death. This prohibition doesn't require *any* additional or different inspections than does the FMIA, and is thus not a regulation of the "premises, facilities and operations" of slaughterhouses. There is no express preemption here.

2. Implied Preemption. NMA's implied preemption claim concerning section 599f's ban on the receipt and slaughter of nonambulatory animals fares no better. That 21 U.S.C. § 678 specifies "[t]his chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters

regulated under this chapter" shows that Congress didn't intend to occupy the field of slaughterhouse regulation, so only conflict preemption is at issue. Conflict preemption is a demanding standard, as courts won't "seek[ ] out conflicts between state and federal regulation where none clearly exists." *English,* 496 U.S. at 90 (internal quotation marks omitted).

It's not physically impossible to comply with both section 599f and the FMIA. FMIA inspection requirements apply to animals that are to be slaughtered for human consumption. *See* 21 U.S.C. §§ 603(a), 641. And nothing in the FMIA *requires* the slaughter of downer animals for human consumption. NMA hangs its impossibility argument on words like "shall" in the federal regulations – for example, "[a]ll . . . nonambulatory disabled livestock *shall* be identified as U.S. Suspects and disposed of as provided in § 311.1 of this subchapter unless they are required to be classed as condemned under § 309.3." 9 C.F.R. § 309.2(b) (emphasis added). But 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. *See Cavel,* 500 F.3d at 553-54 ("When the [FMIA] was passed . . . it was lawful in some states to produce horse meat for human consumption, and since the federal government has a legitimate interest in regulating the production of human food . . . it was natural to

make the Act applicable to horse meat. That was not a decision that states must allow horses to be slaughtered for human consumption.").[5] Whether they may be slaughtered is up to the states.

Section 599f also isn't an obstacle to accomplishing the purposes of the FMIA.[6] The FMIA was adopted to protect the health and welfare of consumers "by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602; *Pittsburgh Melting Co.* v. *Totten,* 248 U.S. 1, 4-5 (1918); *see also United States* v. *Stanko,* 491 F.3d 408, 416-17 (8th Cir. 2007). Its purpose is certainly not to

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[5] NMA argues that, for the few animals that become nonambulatory after being presented for federal inspection (rather than arriving at the slaughterhouse nonambulatory), federal authorities must give their permission for release of these animals. That's because 9 C.F.R. § 309.2(p) says that, after an animal has been presented for inspection, "[w]hen a suspect is to be released . . . for a purpose other than slaughter, the operator of the official establishment or the owner of the animal shall first obtain permission for the removal of such animal. . . ." But state and local officials may also release animals for purposes other than slaughter. 9 C.F.R. § 309.2(p). Moreover, there's no reason to suppose that federal officials wouldn't willingly give permission to euthanize downer animals. *Cf. Wyeth,* 129 S. Ct. at 1198 ("[A]bsent clear evidence that the FDA would not have approved a change to Phenergan's label, we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements.").

[6] Contrary to NMA's argument that California waived its objection to the district court's obstacle holding, California clearly addressed the issue in its opening brief.

preserve the slaughter of any kind of animal for human consumption. *Cavel,* 500 F.3d at 554. Nor do we see any indication that Congress intended to leave the choice of what kinds of animals to slaughter to individual slaughterhouses. *Compare Fla. Lime & Avocado Growers, Inc*. v. *Paul,* 373 U.S. 132, 147-48 (1963) (federal law meant only to establish uniform minimum standards of avocado quality to which states could add), *with Geier* v. *Am. Honda Motor Co.,* 529 U.S. 861, 881 (2000) ("no airbag" tort claim pre-empted because federal law sought to preserve a variety of safety devices from which manufacturers could choose).

Section 599f would only serve as an obstacle to the FMIA if its requirements were so onerous and confusing that it put slaughterhouse compliance with federal inspection standards at risk. Nothing in the record suggests that this is the case, nor will we assume it to be. *Cf. Empacadora,* 476 F.3d at 334 ("The need for uniform meat packaging, inspection and labeling regulations is strong, lest meat providers be forced to master various separate operating techniques to abide by conflicting state laws. There is no similar need for uniformity with regard to what types of meat states permit to be sold. . . ."). Section 599f's directive to slaughterhouses is simple: When slaughterhouses see a nonambulatory animal, they cannot slaughter it for human consumption but must euthanize it immediately. There is no reason to believe that slaughterhouse employees who abide by this directive will have any difficulty complying with

federal inspection standards as to those animals that will be slaughtered for food.[7]

Humane Handling Requirements

Section 599f(e) provides that "[w]hile in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time. . . ." Federal law, by contrast, says that "[t]he dragging of disabled animals and other animals unable to move, *while conscious,* is prohibited. *Stunned animals may, however, be dragged.*" 9 C.F.R. § 313.2(d)(2) (emphases added). And while the FMIA's inspection requirements apply to animals that are to be slaughtered for human consumption, the FMIA's humane handling requirements apply to all animals at the slaughterhouse. FSIS Directive 6100.1 at 4 ("All animals that are on the premises of the establishment . . . are to be handled humanely."). Section 599f(e) thus prohibits conduct – the dragging of unconscious downer animals – that federal law does not.

Federal law also considers more equipment suitable for the purposes of moving downer animals, such

[7] NMA suggests that section 599f will prevent the examination of downer animals for disease, hindering federal procedures designed to identify and stem the spread of disease. Nothing in the record substantiates this concern, and section 599f doesn't prohibit post-mortem inspection of downer animals.

as electric prods, than does section 599f(e). *Compare* 9 C.F.R. § 313.2(d)(3) ("Disabled animals and other animals unable to move may be moved, while conscious, on equipment suitable for such purposes; e.g., stone boats."), *and* FSIS Directive 6900.1(V)(E) (suitable equipment includes "forklift or bobcat-type vehicles and self-propelled tractors capable of pulling stone boats (sleds) or similar conveyances, those conveyances themselves, and holding chutes, and a voltmeter or other suitable equipment that is capable of verifying voltage of electric prods attached to AC current."), *with* Cal. Pen. Code § 599f(e) (nonambulatory animals "shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance."). Section 599f(e) is thus a regulation of the "operations" of an "establishment at which [federal] inspection is provided" that's "in addition to[ ] or different than" federal law and is therefore expressly preempted. 21 U.S.C. § 678.

Although NMA is likely to succeed on its express preemption claim against section 599f(e),[8] it must still show a likelihood of irreparable injury and that the balance of the equities and the public interest tip in its favor in order to justify a preliminary injunction. *See* pp. 5073-74 *supra*. The district court's findings

[8] Contrary to NMA's argument, the likelihood of success as to section 599f(e) doesn't affect the likelihood of success as to section 599f(a)-(c). *See Dalton* v. *Little Rock Family Planning Servs.,* 516 U.S. 474, 478 (1996) (enjoining provision only to the extent that it imposes obligations inconsistent with federal law).

concerning irreparable injury and the balance of the equities focus on the costs of complying with section 599f's ban on the receipt and slaughter of downer animals. The district court failed to make such findings as to section 599f(e)'s humane handling requirements, probably because NMA failed to offer any evidence on the issue.

* * *

NMA isn't likely to succeed on its preemption claims against section 599f(a)-(c)'s ban on the receipt and slaughter of downer animals. And although NMA is likely to succeed on its preemption claim against section 599f(e)'s humane handling provision, it hasn't shown a likelihood of irreparable injury or that the balance of the equities and the public interest tip in its favor for this provision. The district court therefore abused its discretion in granting a preliminary injunction, and the injunction is hereby vacated. Nothing we say here precludes the entry of a preliminary injunction as to section 599f(e) after appropriate findings are made, or a preliminary injunction as to the entirety of section 599f based on other legal theories, *see* p. 5073 n.2 *supra*.

VACATED.

No costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NATIONAL MEAT ASSOCIATION,

Plaintiff,

and

AMERICAN MEAT INSTITUTE,

Plaintiff-Intervenor

v.

EDMUND GERALD BROWN, et al.,

Defendants.

HUMANE SOCIETY, et al.

Defendant-Intervenors./

CASE NO. CV-F-08-1963 LJO DLB

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE MOTION FOR PRELIMINARY INJUNCTION; PRELIMINARY INJUNCTION ORDER

(Filed Feb. 19, 2009)

Pursuant to notice filed on December 23, 2008, Plaintiff National Meat Association moves the Court for a preliminary injunction enjoining Defendants Edmund G. Brown, Arnold Schwarzenegger, and the State of California (collectively "defendants" or "California") from enforcing California Penal Code § 599f, as amended and effective January 1, 2009, against swine slaughterhouses regulated by the Federal Meat Inspection Act, 21 U.S.C. § 601 et seq. Defendants filed an opposition on January 28, 2009. Plaintiffs filed a reply on February 4, 2009. Due to the thorough

briefing by the parties and no response to the Court's invitation to request oral argument, the Motion for Preliminary Injunction was taken under submission pursuant to Local Rule 78-230(h) and the hearing set for February 25, 2009 was vacated. Having considered the moving, opposition, and reply papers, as well as the Court's file, the Court issues the following order.

FACTUAL OVERVIEW

Plaintiff National Meat Association is a voluntary membership-based trade association that represents the interests of packers and processors of livestock, including swine, and meat, including pork and pork products throughout the United States. Plaintiff Intervenor American Meat Institute is a voluntary membership-based trade organization which has members in California that package and process meat products.

The defendants are the State of California and its officers Arnold Schwarzenegger and Edmund Brown, the Governor and Attorney General, respectively. Defendant intervenors The Humane Society of the United States, Farm Sanctuary, Inc., the Humane Farming Association, and Animal Legal Defense Fund are non-profit organizations dedicated to the advocacy and protection of animals.

A. California Penal Code § 599f, as amended

Effective January 1, 2009, California Penal Code § 599f, as amended ("Section 599f"), prohibits the sale of meat or meat product of "nonambulatory" animals for human consumption, and requires the immediate euthanization of nonambulatory animals. Defendants argue that Section 599f was amended in response to video footage obtained by the Humane Society of inhumane treatment of animals at a slaughterhouse facility. In addition to the concern for the humane treatment of the animals, the public health concern was raised as to the meat derived from "downed animals." (Doc. 53, California's Opposition p. 3.) Downed animals may be susceptible to various diseases and have a greater likelihood of carrying disease, which can be passed onto humans from contaminated meat. Defendants argue that the amendments to Section 599f prohibit the purchase, slaughter and sale of non-ambulatory ("downed") animals for the protection of people, the animals and the food supply. (Doc. 53, California's Opposition p. 3-4.)

Section 599f provides:

> 599f. Nonambulatory animals; slaughter houses, stockyards, auctions, market agencies, or dealers; transactions; processing; euthanasia; movement; violations
>
> > (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.*

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

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

(h) A violation of this section is subject to imprisonment in the county jail for a

> period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.
>
> (I) As used in this section, "*nonambulatory*" *means unable to stand and walk without assistance.*
>
> (j) As used in this section, "animal" means live cattle, swine, sheep, or goats.
>
> (k) As used in this section, "humanely euthanized" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain. (Emphasis added.)

Section 599f prohibits a slaughterhouse from buying, selling, or receiving nonambulatory animals for human consumption. Any such animal that is received nonambulatory or becomes so after receipt must be euthanized. Cal.Penal Code §599f(c).

B. Effect upon Plaintiff

Plaintiff argues that Section 599f will expand dramatically the restrictions and prohibitions governing the manner in which federally-inspected slaughterhouses in California, including those that slaughter swine, may purchase and process livestock for slaughter and the manner in which they may sell meat, including pork and pork products. Plaintiff argues that Section 599f expands the scope of criminal

penalties imposed on such slaughterhouses and their employees for violations of the statute.

REQUEST FOR PRELIMINARY INJUNCTION

Plaintiff moves for a preliminary injunction to enjoin enforcement of Section 599f against swine slaughterhouses pending resolution of the case on the merits. Plaintiff argues that it is entitled to a preliminary injunction because it has a substantial likelihood of success on the merits, will be irreparably harmed if enforcement is not so enjoined and does not have an adequate remedy at law. Absent injunctive relief, plaintiff argues its members will suffer irreparable injury, including potential criminal and monetary penalties and significant disruption of their members' business operations. Plaintiff argues no adequate remedy at law exists because the State of California's sovereign immunity from suit.

A. Injunction Standards

The legal principles applicable to a request for preliminary injunctive relief are well established. To prevail, the moving party must show either "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the moving party's] favor." *Oakland Tribune, Inc. v. Chronicle Publishing Company, Inc.,* 762 F.2d 1374, 1376 (9th Cir. 1985), ***quoting*** *Apple Computer, Inc. v. Formula International,*

Inc., 725 F.2d 521, 523 (9th Cir. 1984). Plaintiff need not show positively it will prevail on the merits. A reasonable probability of success, not an overwhelming likelihood, is all that need be shown for preliminary injunctive relief. *Gilder v. PGA Tour, Inc.,* 936 F.2d 417, 422 (9th Cir. 1991). The two formulations represent two points on a sliding scale with the focal point being the degree of irreparable injury shown. *Oakland Tribune,* 762 F.2d at 1376. "Under either formulation of the test [for injunctive relief], plaintiff must demonstrate that there exists a significant threat of irreparable injury." *Id.*

A preliminary injunction's purpose is to preserve the status quo if the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions until the merits of the action are ultimately determined. *University of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830 (1981). "Status quo" means the last uncontested status that preceded the pending controversy. *GoTo.com, Inc. v. Walt Disney Co.,* 202 F.3d 1199, 1210 (9th Cir. 2000). Additional criteria must be satisfied for a preliminary injunction to be available to a plaintiff:

1. A strong likelihood of success on the merits;

2. Possibility of irreparable harm to plaintiff absent an injunction;

3. Threatened injury to plaintiff outweighs damage which the proposed injunction may cause to the opposing party; and

4. Public interest favors issuance of an injunction.

See Regents of the Univ. of California v. American Broadcasting Companies, Inc., 747 F.2d 511, 515 (9th Cir. 1984); *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1200 (9th Cir. 1980).

B. Likelihood of Success on the Merits

Plaintiff argues that it has a strong likelihood of success on the merits because Section 599f is preempted. Plaintiff argues that Section 599f, as applied to swine slaughter houses, is preempted by the provisions of the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §601 et seq.

1. The Preemption Doctrine

The preemption doctrine has its roots in the Supremacy Clause of the Constitution, which provides that the Constitution, laws, and treaties of the United States are the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Federal preemption can be either express or implied. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 152-53, 102 S.Ct. 3014, 73

L.Ed.2d 664 (1982); *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 982 (9th 2008). When a federal statute contains an explicit preemption provision, we are to "'identify the domain expressly preempted' by that language." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 484, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)). Express preemption statutory provisions, however, should be given a narrow interpretation. *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008), *petition for certiorari* filed, 77 USLW 3366 (Dec 10, 2008).

Implied preemption has two subcategories. *See Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001); *Chicanos Por La Causa, Inc. v. Napolitano,* 544 F.3d at 982. The first is field preemption, where "the depth and breadth of a congressional scheme . . . occupies the legislative field." *Id.* (citing *Fid. Fed. Sav.,* 458 U.S. at 153, 102 S.Ct. 3014). The second is conflict preemption, which occurs when either "compliance with both federal and state regulations is a physical impossibility," *Fid. Fed. Sav.,* 458 U.S. at 152, 102 S.Ct. 3014 (quoting *Fla. Lime & Avocado Growers, Inc.,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)), or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fid. Fed. Sav.,* 458 U.S. at 152 (internal quotation marks omitted) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85

L.Ed. 581 (1941)). For conflict preemption to apply, the conflict must be an actual conflict, not merely a hypothetical or potential conflict. *See English v. Gen. Elec. Co.,* 496 U.S. 72, 89, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

2. Arguments on Express Preemption

Plaintiff argues that the Federal Meat Inspection Act expressly preempts states from enacting laws which impose additional or different requirements on meat processing and inspections. Plaintiff argues that 21 U.S.C. §678 precludes state requirements which are "in addition to, or different than those under this chapter . . . " Plaintiff argues the Section 599f imposes additional or different requirements because it prohibits slaughterhouses from allowing meat from a nonambulatory animal, in particular swine, to be processed or butchered for human consumption. This differs from federal law which allows slaughterhouses to set aside disabled or fatigued animals for inspection. In addition, Section 599f imposes an additional prohibition on slaughterhouses' buying or receiving nonambulatory animals. Plaintiff argues that Section 599f simultaneously expands the scope of criminal penalties imposed on such slaughterhouses and their employees for violations of the statute.

Defendants argue the Congress specifically allowed states to enact laws consistent with the Federal Meat Inspection Act and did not expressly preempt state laws: "This Act shall not preclude any State . . . from

making requirement[s] or taking other action, consistent with this Act, with respect to any other matters regulated under this Act." 21 U.S.C. §678. Defendants acknowledge that the FMIA expressly preempts in two areas: (1) the "premises, facilities and operations of any establishment at which inspection is provided," and (2) the "marking, labeling, packaging and ingredient requirements." Defendants acknowledge that the FMIA exclusively deals with certain aspects of the meat inspection process, but defendants argue that all other aspects may be regulated. (Doc. 53, California's Opposition p. 7-8.) Defendants argue that §678 of the FMIA does not limit a state from regulating what "type of meat" may be sold for human consumption, citing *Empacadora De Carnes De Fresnillo v. Curry,* 476 F.3d 326, 333 (5th Cir.), *cert. denied,* 127 S.Ct. 2443, 167 L.Ed.2d 1131 (2007). (Doc. 53, Opposition p. 8.) Defendants note that there is no provision in FMIA or the regulations that expressly provide for the method nonambulatory animals are processed and slaughtered.

Further, defendants argue the federal regulations implementing the FMIA contemplate disposal of nonambulatory animals and do not require that this "type of meat" be processed and introduced into the food supply. (Doc. 53, Opposition p. 8, citing 9 C.F.R. §§ 309.2(b), 309.3(a-c), 309.13, 313.2(d).) And *Cavel Intern., Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007) (The Act 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), *cert. denied*, 128 S.Ct. 2950, 171 L.Ed.2d 863 (2008). Defendants argue Section 599f specifies what type of meat may enter the food supply and how to humanely treat the animals. It does not regulate the "premises, operations" or govern the "marking, labeling and packaging" of ingredients. No specific language in the FMIA expressly forbids California from specifying what type of meat may be processed for human consumption.

3. The Federal Meat Inspection Act ("FMIA")

Plaintiff challenges Section 599f's provisions, as applied to swine slaughterhouses in the State of California, as conflicting with those imposed under the FMIA, 21 U.S.C. § 601 et seq. and its implementing regulations. Plaintiff argues that Section 599f expands the prohibitions governing the manner in which federally-inspected slaughterhouses located within the State of California, including those that slaughter swine, may purchase and process livestock for slaughter and the manner in which they may sell meat, including pork and pork products.[1]

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[1] Defendant Intervenors, The Humane Society *et. al,* contend the challenge to Section 599f is untimely. Section 599f has been in existence for 14 years and was amended in July 2008. The Humane Society contends plaintiff has delayed enforcing its rights-first in the 14 years of the statute's existence, and then from the delay from July 2008 to December 2008, shortly before Section 599f went into effect. Section 599f, however, has not

(Continued on following page)

The Federal Meat Inspection Act, 21 U.S.C. § 601 et seq., was enacted by Congress in 1907 in response to concerns over the safety of meat and meat products. The FMIA provides "an elaborate system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products, with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce." *Pittsburgh Melting Co v. Totten,* 248 U.S. 1, 4-5, 39 S.Ct. 3, 3 (1918). The very purpose of the FMIA is to ensure the safety of the nation's food supply and to minimize the risk to public health from potentially dangerous food and drug products. See 21 U.S.C. § 602 (stating 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"); *U.S. v. Stanko*, 491 F.3d 408, 416 (8th Cir. 2007) (FMIA's primary public-health purpose is to protect consumers from unsafe meat, citing 21 U.S.C. §602), *cert. denied,* 128 S.Ct. 1874, 170 L.Ed.2d 752 (2008).

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been in its current, challenged form for 14 years. The amended Section 599f, effective January 1, 2009, differs because it no longer exempts federally-inspected slaughterhouses from its prohibition on buying, selling, or receiving a nonambulatory animal; it requires the immediate euthanization of any animal that becomes nonambulatory while awaiting slaughter; and it prohibits processing meat from nonambulatory animals. Thus, the Court rejects the argument based on untimeliness.

Congress included an express provision that preempts States from enacting any processing or inspection law that adds to or is different from those enacted under the FMIA. Section 678 states in part:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided . . . which are *in addition to, or different than* those made under *this chapter* may not be imposed by any State. . . .

21 U.S.C. § 678 (emphasis added). The chapter referred to is the chapter for "Meat Inspection." 21 U.S.C. §601 et seq. This preemption clause expressly limits a state in its ability to govern meat inspection requirements. *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry,* 476 F.3d 326, 333 (5th Cir. 2007).

Congress did not intend to preempt the entire field of meat commerce under the FMIA. The Act's title refers specifically to meat inspection, rather than a more comprehensive scheme of meat regulation. The FMIA permits the states to create laws consistent with the FMIA, for "other matters":

> This chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with *respect to any other matters* regulated under this chapter.

21 U.S.C. § 678 (emphasis added). The FMIA thus permits states to regulate what types of meat may be sold for human consumption in the first place. *Empacadora,* 476 F.3d at 334 (holding that the FMIA does not preempt the type of meat, such as horse meat, which can be sold for human consumption). The FMIA did not expressly preempt Texas's prohibition on horsemeat for human consumption. *See also U.S. v. Stanko,* 491 F.3d at 418 (FMIA does not preempt state unfair-trade-practices laws in general).

The FMIA is a public health statute, aimed at "preventing the use in commerce of meat and meat food products which are adulterated. . . ." 21 U.S.C. § 603(a):

> § 603. Inspection of meat and meat food products:
>
> (a) Examination of animals before slaughtering; diseased animals slaughtered separately and carcasses examined
>
> > *For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors* appointed for that purpose, *an examination and inspection* of all amenable *species before they shall be allowed to enter* into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in

> commerce; and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other amenable species, and when so slaughtered the carcasses of said amenable species shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary, as provided for in this subchapter. (Emphasis added.)

FMIA requires the Secretary of Agriculture to examine and inspect "all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering or similar establishment. . . ." 21 U.S.C. § 606:

> § 606. Inspectors of meat food products; marks of inspection; destruction of condemned products; products for export; catfish examination and inspection
>
> (a) In general
>
> For the purposes hereinbefore set forth the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment . . .

The act has broad coverage – requiring slaughter in accordance with the FMIA. 21 U.S.C § 610 (requiring

slaughter to be in compliance with the chapter on meat inspection.)

4. Implementing Regulations

The Food Safety and Inspection Service ("FSIS"), an agency of the United States Department of Agriculture ("USDA"), is charged with implementing and enforcing the FMIA. See 21 U.S.C. § 601 et seq. ("The term Secretary means the Secretary of Agriculture"). The FMIA's implementing regulations are set forth in Title 9 of the Code of Federal Regulations, 9 C.F.R. § 301 et seq., and govern the meat production process from the time animals are delivered to the slaughterhouse to the time consumers purchase the meat product.

The implementing regulations establish the inspection procedure from the initial arrival of the animals at a facility. "All livestock . . . entering any official establishment . . . shall be inspected, handled, . . . as required by the regulations in this subchapter." 9 C.F.R. § 302.3. The implementing regulations set out a procedure for identifying and handling "non-ambulatory disabled livestock." First, the implementing regulations define "disabled livestock," with symptoms of: "(5) Lack of muscular coordination; (6) Inability to walk normally or stand." 9 C.F.R. § 301.2.

The USDA classifies all downed livestock presented for slaughter as "U.S Suspects." A non-ambulatory disabled animals may be set aside and later presented for slaughter.

> (b) All seriously crippled animals and non-ambulatory disabled livestock shall be identified as U.S. Suspects and disposed of as provided in § 311.1 of this subchapter unless they are required to be classed as condemned under § 309.3. Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk, . . .

9 C.F.R. § 309.2(b). Animals which are identified as "U.S. Suspect," including non-ambulatory disabled livestock, are set aside and handled according to a set procedure:

> (n) Each animal identified as a U.S. Suspect on ante-mortem inspection shall be set apart and shall be slaughtered separately from other livestock at that establishment unless disposed of as otherwise provided in this part.
>
> (m) Each animal identified as a U.S. Suspect on ante-mortem inspection, when presented for slaughter shall be accompanied with a form MP 402-2 on which the inspector at the establishment. . . .

9 C.F.R. § 309.2. The regulations provide that U.S. Suspects and "disabled livestock" shall be separated: "Disabled livestock and other animals unable to move . . . shall be separated from normal ambulatory animals and placed in the covered pen." 9 C.F.R. § 313.2. These animals are held in the "covered pen . . . while awaiting disposition by the inspector." 9 C.F.R. § 313.1(c). If upon inspection, the downed animal shows signs of

certain diseases, it is condemned and disposed of according to specified procedures. See 9 C.F.R. §§ 309.4-309.15. However, if the downed animal passes post-mortem inspection by a veterinary officer, it may be passed in whole or in part for human food. See generally 9 C.F.R. § 311.1.

Thus, the FMIA, along with its implementing regulations, is a public health statute the scope of which is to examine and inspect meat and meat products and employing procedures and methods to ensure the safety of the nation's food supply and to minimize the risk to public health.

5. Express Preemption of Section 599f

The FMIA's preemption clause expressly limits states in their ability to govern meat inspection and labeling requirements "of any establishment at which inspection is provided [under the statute]." 21 U.S.C. §678. *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153 ("Federal regulations have no less preemptive effect than statutes.")

California's statute, which requires meat products to be handled in a manner other than that prescribed by the FMIA or the USDA regulations, is "in addition to or are different than" the federal regulations. The express preemption provision contemplates all meat inspection shall be according to the standards in FMIA. Section 599f alters the process and methods for the receipt of animals, the determination of the animal as "disabled" or "nonambulatory,"

and also alters the subsequent handling of the nonambulatory animal. *Empacadora,* 476 F.3d at 333 (the FMIA's preemption clause is more naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use). The FMIA and its implementing regulations permit a slaughterhouse to set aside for further inspection an animal that is nonambulatory.

Section 599f, on the other hand, expressly requires that the same animal be "immediately" euthanized. Assessing whether the animals are ambulatory or nonambulatory is undoubtedly an "inspection." Assessing whether the animals are ambulatory or nonambulatory is, by defendants' admission, in order to protect quality of the food supply. Determining what to do with an animal found to be "nonambulatory" is part of an inspection. Pursuant to Section 599f, upon an inspection and determination that an animal is "nonambulatory," the animal must be euthanized. The FMIA does not contain such a requirement. The implementing regulations require the animal to be set aside for further inspection.

The FMIA expressly prohibits state requirements that are "in addition to" or "different than" those in FMIA. Section 599f imposes inspection requirements upon federally inspected slaughterhouses which are in addition to or different than FMIA. Thus, Section 599f is expressly preempted by the FMIA. 21 U.S.C. § 678 ("Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided . . .

which are in addition to, or different than those made under this chapter may not be imposed by any State.")

Defendants argue that the FMIA does not limit California's ability to regulate the "type of meat" which may be sold for human consumption, citing *Empacadora,* 476 F.3d at 334 (holding that the FMIA does not preempt the type of meat, such as horse meat, which can be sold for human consumption). Defendants argue that Section 599f limits the "type of meat" sold for human consumption. It limits the type of meat by limiting meat of "nonambulatory animals." The "type of meat" is "nonambulatory meat." Here, California argues that it limited the "type of meat" sold for human consumption by prohibiting purchasing, selling or processing nonambulatory animals, just as Texas and Illinois prohibit the processing of horse meat for human consumption. *See also Cavel Int'l*, 500 F.3d 551 (The FMIA's preemption clause did not preempt Illinois statute making it unlawful to slaughter horses for human consumption).

California's argument is without merit. *Empacadora* stated that the FMIA does not prohibit a state from barring any particular type of animal from being introduced into the food chain, such as horse meat. *Empacadora,* 476 F.3d at 333 ("The FMIA does not expressly dispose states of the ability to define what meats may be available for slaughter and human consumption."); *Cavel,* 500 F.3d at 554, (acknowledging that if a certain animal specifies are not produced for human consumption, the FMIA does not apply).

Thus, a state rightly could preclude different types of meat for human consumption, such as horse meat or dog meat or rat meat, for that matter. A nonambulatory pig is not a "type of meat." A pig is a pig. A pig that is laying down is a pig. A pig with three legs is a pig. A fatigued or diseased pig is a pig. Calling it something else does not change the type of meat produced. Thus, the exception discussed in *Empacadora* does not apply.

Pursuant to *Empacadora* and *Cavel,* California could prohibit *all* pigs from being processed for human consumption and not be preempted by FMIA. However, California permits pigs to be produced for human consumption. Therefore, California is barred from imposing additional or different inspection requirements on animals to be produced for human consumption. Having allowed pigs and swine to enter the food supply, California cannot alter the federally mandated requirements of inspection. *See Nat'l Broiler Council v. Voss,* 44 F.3d 740, 745 (9th Cir. 1994) (In interpreting identical express preemption language in the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 467e, the Ninth Circuit held that the phrase "in addition to, or different than" preempts States from enforcing any regulations "not identical" to federal requirements.)

California also argues that plaintiff cites to no provision in the FMIA or the regulations which expressly provides for how nonambulatory animals shall be processed and slaughtered in the normal course of business. As shown above, the federal

regulations govern how an animal is handled and processed from the time the animal enters the slaughterhouse premises. FMIA intends to regulate the "premises, facilities and operations" of federally inspected slaughterhouses. Indeed, regulations are in place which process the very kind of nonambulatory animals that are addressed in Section 599f.

California argues that Section 599f is required to protect humane treatment of animals. FMIA and its implementing regulations, however, contain provisions for the humane treatment of animals. See, e.g., 21 U.S.C. §610 (inhumane slaughter prohibited); 9 C.F.R. §313.1(livestock pens); 2 C.F.R. §313.9 (handling of livestock). California is not precluded from enforcing the provisions of the FMIA. The FMIA allows for concurrent state jurisdiction to enforce its requirements. See 21 U.S.C. § 678. However, such concurrent jurisdiction does not allow states to enact their own additional requirements. *Nat'l Broiler Council v. Voss,* 44 F.3d 740, 746 (9th Cir.1994) (finding preemption under FMIA and noting that states may enforce the federal labeling laws, but that the USDA did not grant states authority to enact their own, additional requirements).

Accordingly, Section 599f impermissibly "differs from" and is "addition to" the FMIA and is therefore preempted by such federal laws.

6. "Conflict Preemption"

Plaintiff argues that Section 599f is impliedly preempted because it conflicts with the FMIA. Plaintiff argues uniformity in the federal regulation of meat inspections was of paramount importance to Congress, and trumps California's efforts to enact a different, conflicting law with respect to the human consumption of nonambulatory animals, citing *Armour & Co. v. Ball,* 468 F.2d 76, 84-85 (6th Cir. 1972), *cert. denied,* 411 U.S. 981, 93 S.Ct. 2267 (1973); *see also Nat'l Boiler Council,* 44 F.3d at 746. Swine slaughterhouses in California currently follow standard operating procedures. Under federal regulations, nonambulatory animals may be delivered to slaughterhouse but under Section 599f such animals would have to be refused and returned to shipper. Animals that are later unable to stand would have to be euthanized immediately. Nonambulatory animals due to fatigue may be slaughtered under federal regulations but not under Section 599f.

Defendants argue that Section 599f is consistent with the federal provisions. A slaughterhouse may comply with federal law while complying with Section 599f. Defendants argue that there is no federal requirement that an animal without the ability to stand and walk be held at the slaughterhouse. There is no federal requirement that slaughterhouses hold nonambulatory animals until the animal is inspected. Rather, it is the slaughterhouse's economic choice to hold the animal.

Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives. *Whistler Investments, Inc. v. Depository Trust and Clearing Corp.,* 539 F.3d 1159, 1164 (9th Cir. 2008), citing *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000).

Here, the implied conflict preemption analysis is substantially similar to the analysis of the Act's express preemption provision. As noted *infra,* the FMIA provides an elaborate meat inspection scheme "with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce." *Pittsburgh Melting Co v. Totten,* 248 U.S. at 4-5. The purpose of the FMIA is to ensure the safety of the nation's food supply and to minimize the risk to public health from potentially dangerous food and drug products. 21. U.S.C. § 602. The FMIA and the implementing regulations contain comprehensive requirements for meat inspection, handling and processing. Section 599f imposes different or additional requirements on inspection, handling and processing meat. For instance, "disabled" livestock, which is defined in part as unable to stand and walk, are subject to further inspection. Under Section 599f, disabled livestock must be immediately euthanized.

Defendants argue that there is no implied preemption because there is no federal requirement that a disabled animal be set aside for further inspection. (Doc. 53, Opposition p.11.) California argues that the animal can be immediately euthanized without violating any federal requirement.

Section 599f is in conflict with the FMIA and its implementing regulations. The regulations state that disabled livestock shall be identified as U.S. Suspects (21 C.F.R. §309.2) and set aside for further inspection and disposition. 9 C.F. R. §313.2. Section 599f conflicts with the regulatory scheme because it alters the federally mandated procedure once an animal is identified as disabled. This inspection procedure is part of a comprehensive scheme to ensure the quality of the meat supply. While California argues that it too seeks to protect the meat supply, it is doing so with language that conflicts with the procedure described in the implementing regulations. These additional state requirements conflict in areas that are clearly encompassed by the federal regulations.

7. Plaintiff's Dormant Commerce Clause and "Constitutionally Vague" Arguments

Since the Court has found that Section 599f is expressly and impliedly preempted by the FMIA and its implementing regulations, the Court does not need to reach the additional arguments that Section 599f violates the dormant commerce clause and is unconstitutionally vague.

C. Irreparable Injury

Plaintiff argues that its members will be irreparably harmed unless the Court grants injunctive relief. Plaintiff's members face a conflict between complying with the FMIA's processing and safety inspection requirements or the different and conflicting requirements of Section 599f. Section 599f imposes imprisonment and monetary fines for failure to comply. Plaintiff also argues that Section 599f will result in substantial disruption of members' business operations. Plaintiff gives as an example that at one facility, the facility will be required to euthanize and render approximately 225 additional hogs per day, which requires a costly expansion of the facility and a significant loss of annual revenues. (Doc. 20, Terrill Decl. ¶9 (225 hogs), ¶12 (cost of compliance).) These losses, plaintiff further argues, cannot be compensated at law because Defendants enjoy immunity from suit for damages.

California argues that plaintiff has not presented evidence that there will be a substantial disruption of members' business. Plaintiff fails to cite to any evidence that 225 hogs are temporarily unable to walk (citing Plaintiff's brief at p. 22.) There is no testimony on how many of the 225 hogs would pass federal inspection; plaintiff simply assumes all would fail federal inspection. Further, defendants argue plaintiff over estimates the number of hogs needed to be euthanized, including hogs that are sleeping, stress or fatigued.

A preliminary injunction "may only be granted when the moving party has demonstrated a significant threat of irreparable injury, irrespective of the magnitude of the injury." *Simula, Inc. v. Autoliv, Inc.,* 175 F.3d 716, 725 (9th Cir. 1999). Plaintiff "must demonstrate immediate threatened harm." *Caribbean Marine Serv. Co., Inc. v. Baldridge,* 844 F.2d 668, 674 (9th Cir. 1988). Plaintiff must demonstrate potential harm which cannot be redressed by a legal or equitable remedy following trial. The preliminary injunction must be the only way of protecting the plaintiff from such harm. *Campbell Soup Co. v. ConAgra, Inc.,* 977 F.2d 86, 91 (3rd Cir. 1992).

Here, the evidence establishes that plaintiff's members comply with the FMIA inspection requirements. There is no evidence that plaintiff's members fail to so comply. In compliance with the FMIA, plaintiff's members process into the food supply swine which are "nonambulatory." There is no argument or evidence that the members are in violation of the FMIA for processing such nonambulatory animals into the food supply. Thus, the evidence establish that the plaintiff's members are in compliance with the FMIA when they process nonambulatory animals, which pass federal inspection, into the food supply.

The parties are in agreement that same animals would be barred from processing into the food supply under Section 599f. Plaintiff presents evidence of the quantity of swine which would be precluded from being processed for human consumption and the corresponding estimated monetary loss for one of its

members. Defendants argue that speculative injury does not support "irreparable harm," citing *Big Country Foods, Inc. v. Board of Ed. Of Anchorge Sch. Dist.* 868 F.2d 1085, 1088 (9th Cir. 1989) (plaintiff was out bid and sued to enjoin the governmental entities' acceptance of the lower bid. The Court held that irreparable harm is not shown where the "lost profits" from a contract are speculative.)

Here, the evidence is not speculative as to the economic harm. First, the evidence indicates, and certainly common sense corroborates, that an animal meant for human consumption is worth more than an animal designated for scrap. The evidence presented shows some level of significant monetary harm. The defendants quibble over the exact number of pigs which would be rendered or the exact monetary value of such animals. What is required is *some* irreparable injury must be threatened; otherwise, injunctive relief will be denied. A preliminary injunction "may only be granted when the moving party has demonstrated a significant threat of irreparable injury, *irrespective of the magnitude of the injury*." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d at 725 (emphasis added). Further, if additional animals cannot be processed into the food supply, plaintiff's members must have a way to dispose of nonambulatory animals. Common sense indicates that facilities may need to be expanded or alternative means contracted for to dispose of the animals. In addition, plaintiff's members face potential criminal penalties for following the mandates of federal law.

The monetary losses are not compensable because defendants are entitled to sovereign immunity. It is well established that agencies of the state are immune under the Eleventh Amendment from private damages or suits for injunctive relief brought in federal court. *See, e.g., Savage v. Glendale Union High School, Dist. No. 205, Maricopa County,* 343 F.3d 1036, 1040 (9th Cir. 2003) citing *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). The Eleventh Amendment precludes suits "in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *In re Pegasus Gold Corp.,* 394 F.3d 1189, 1195 (9th Cir. 2005). A State may waive its sovereign immunity by consenting to suit. *Id.* Here, there is no argument that California has waived its sovereign immunity. Accordingly, relief in the form of monetary damages is barred by California's sovereign immunity.

Defendant intervenors argue that plaintiff's members were in violation of the predecessor to Section 599f – in that the predecessor statute required slaughterhouses to immediately euthanize nonambulatory animals. The Humane Society argues that plaintiff was in violation of the prior law, and that the practices for euthanizing animals preexisted for 14 years before the amendment to section 599f. Thus, the Humane society argues, there can be no irreparable harm.

This argument is summarily dismissed. The former Section 599f did not apply to federally inspected slaughterhouses. The amended Section 599f changed the law, and encompassed federally inspected slaughterhouses. Under former 599f, federally inspected slaughterhouses were not covered, and therefore were not required to comply with the provision to euthanize animals.

The Court finds that plaintiff is faced with an immediate threat of irreparable harm, given that (1) Section 599f conflicts with the provisions of the FMIA, (2) compliance with Section 599f will require slaughterhouses to divert to rendering nonambulatory animals covered by Section 599f, which will increase the cost of processing scrap meat and reduce the revenue from human consumable animals, (3) plaintiff's members face criminal penalties for failure to do so, and (4) monetary damages are noncompensable because defendants are immune. For these reasons, Plaintiff has shown a sufficient threat of irreparable injury or loss for which there is no adequate remedy to support a preliminary injunction.

D. Equities in Favor of California

California argues that the equities weigh in favor of enforcement of the statute. California argues that in light of the health hazards of meat from nonambulatory animals slaughtered for human consumption, California acted to protect the public's food supply and promote humane treatment of animals.

Protection of the food supply far outweighs the purported economic harm to plaintiff.

Under Ninth Circuit precedent, the Court must examine the public interest involved. The public interest inquiry primarily addresses the impact on non-parties rather than parties. *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002). When interim equitable relief is authorized and the public interest is involved, "courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. First Nat'l City Bank,* 379 U.S. 378, 383, 85 S.Ct. 528, 531 (1965). Injunctive relief may be refused where it would adversely affect the rights of persons who are not parties to the litigation. *Horwitz v. Southwest Forest Indus., Inc.,* 604 F.Supp. 1130, 1136 (D NV 1985); *see Publications Int'l, Ltd. v. Meredith Corp.,* 88 F.3d 473, 478 (7th Cir. 1996). Where the public interest is involved, the court must also determine whether the public interest favors the moving party. *Sammartano,* 303 F.3d at 974.

The public interest in this case is significant. The public interest deals with the quality and quantity of meat entering into the food supply. California's interest is in ensuring that the meat supply is not tainted by diseased or potentially diseased animals. As discussed more fully above, downed animals have been shown to have increased risk of carrying

disease. California has a significant interest in ensuring the health of its citizens from properly handled and slaughtered animals.

On the other side of the equation, the risk of harm is minimized by the FMIA and its implementing regulations. The very purpose of the FMIA is to reduce and eliminate the potential risk of infecting the food supply through comprehensive inspection procedures. Thus, California's public interest in protecting the quality of the food supply is embodied in the FMIA and its implementing regulations.

There is the risk of harm should Section 599f NOT be enjoined. The risk exists for a reduction in the quantity of the food supply. As more fully explained above, the FMIA inspection procedures are designed to eliminate the risk of disease, with the concomitant benefit of maximizing the abundance of the food supply. It is uncontroverted that California's statutory scheme will reduce, in some part, the amount of meat introduced into the food supply. It takes animals out of the food supply which would/might pass federal inspection. This Court does not have before it the evidence to determine whether this reduction in and of itself is significant, but the evidence establishes that some reduction in the food supply will occur. *Sierra Club v. Georgia Power Co.,* 180 F.3d 1309, 1310 (11th Cir. 1999) (Preliminary injunction denied where the harm to the public from reduced electrical power outweighed any potential environmental harm from the continued discharge.) Reducing the quantity of the food supply is a

substantial factor warranting enjoining enforcement of Section 599f.

Further, the potential harm from enjoining Section 599f is lessened because, as shown above, California has concurrent jurisdiction to enforce the provisions of the FMIA.

The risk of inhumane treatment to animals is also considered as a significant public interest. As argued by the Humane Society, "[i]f the California Legislature believed that federal law already protected both animal welfare and the public health . . . it would not have amended section 599f in the wake of the HSUS's investigation of Hallmark/Westland." (Doc. 46-4, Humane Society opposition p.23.) California and the defendant intervenors are convinced that absent Section 599f, animals will be inhumanely treated – prodded, poked, kicked to stand and proceed to slaughter. Indeed, these are significant public interest issues which are acknowledged by California's "need to do more" than perceived done in the FMIA and its implementing regulations. This public interest weighs against the issuance of a preliminary injunction enjoining Section 599f.

Again, as shown above, the FMIA and implementing regulations provide for the humane treatment of animals. The Court acknowledges that the enforcement scheme may not extend as far as California and defendant intervenors would prefer. Nonetheless, California is not without statutory authority

to protect animals. California may enforce these federal protections.[2]

Accordingly, in the interest of protecting the quality of the food supply and the quantity of meat processed for human consumption, and because adequate enacted law minimizes the potential risk, the Court finds that the balance of interests weigh in favor of enjoining enforcement of Section 599f against swine slaughterhouses regulated by the Federal Meat Inspection Act.

E. Bond Pursuant to Rule 65

Pursuant to Rule 65, "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."

California has not argued that a bond should be issued for its protection. Indeed, the Court finds that no costs or damages are incurred by California by the issuance of the injunction. Therefore, no bond will be ordered to be posted.

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[2] The Court acknowledges the investigation by the Humane Society in which it uncovered inhumane treatment at a slaughterhouse facility. This Court does not trivialize or disregard the treatment of animals. This conduct, however, is but one of various factors the Court must consider under the law.

CONCLUSION AND ORDER

For the foregoing reasons, the Court finds that a preliminary injunction should issue enjoining enforcement of Section 599f against swine slaughterhouses regulated by the Federal Meat Inspection Act.

IT IS THEREFORE HEREBY ORDERED that the necessary elements for a Preliminary Injunction under Rule 65 of the Federal Rules of Civil Procedure have been satisfied, and Plaintiff's Motion is GRANTED as follows:

Defendants and their agents, servants, employees, officers, representatives, successors and assigns, and all persons, firms, and corporations acting in connection or participation with Defendants or on their behalf, are hereby enjoined and restrained from enforcing California Penal Code § 599f, as amended and effective January 1, 2009, against swine slaughterhouses regulated by the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq*.

This Order shall be effective upon completion of personal service upon the designated representatives of each of the named defendants.

IT IS SO ORDERED.

Dated: February 19, 2009 **/s/ Lawrence J. O'Neill**
UNITED STATES
DISTRICT JUDGE

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL MEAT ASSOCIATION,

Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,

Plaintiff-intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,

Defendants-Appellants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Defendants-intervenors.

No. 09-15483

D.C. No. 1:08-cv-01963-LJO-DLB

ORDER

(Filed May 25, 2010)

NATIONAL MEAT ASSOCIATION, Plaintiff-Appellee, and **AMERICAN MEAT INSTITUTE**, Plaintiff-intervenor, v. **EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,** Defendants, and **THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,** Defendants-intervenors-Appellants.	No. 09-15486 D.C. No. 1:08-cv-01963-LJO-DLB

KOZINSKI, Chief Judge:

Plaintiff-Appellee's motion to stay the mandate pending the filing of a timely petition for certiorari is granted. *See* Fed. R. App. P. 41(d)(2).

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL MEAT ASSOCIATION,

Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,

Plaintiff-Intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,

Defendants-Appellants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Defendant-Intervenors.

No. 09-15483

D.C. No. 1:08-cv-01963-LJO-DLB

ORDER

(Filed May 18, 2010)

NATIONAL MEAT ASSOCIATION,

Plaintiff-Appellee,

and

AMERICAN MEAT INSTITUTE,

Plaintiff-Intervenor,

v.

EDMUND G. BROWN, in his official capacity as Attorney General of California; ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; STATE OF CALIFORNIA,

Defendants,

and

THE HUMANE SOCIETY OF THE UNITED STATES; FARM SANCTUARY, INC.; HUMANE FARMING ASSOCIATION; ANIMAL LEGAL DEFENSE FUND,

Defendant-Intervenors-Appellants.

No. 09-15486

D.C. No. 1:08-cv-01963-LJO-DLB

Before: **KOZINSKI**, Chief Judge, **REINHARDT** and **SILVERMAN**, Circuit Judges.

The petition for rehearing and rehearing en banc is denied. *See* Fed. R. App. P. 35, 40.

APPENDIX E

The Federal Meat Inspection Act, 21 U.S.C. § 601, *et. seq.*, provides in relevant part:

§ 602. Congressional statement of findings

Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as

contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

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§ 603. Inspection of meat and meat food products

(a) Examination of animals before slaughtering; diseased animals slaughtered separately and carcasses examined

For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce; and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other amenable species, and when so slaughtered the carcasses of said amenable species shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary, as provided for in this subchapter.

(b) Humane methods of slaughter

For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which amenable species are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this chapter. The Secretary may refuse to provide inspection to a new slaughtering establishment or may cause inspection to be temporarily suspended at a slaughtering establishment if the Secretary finds that any amenable species have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901-1906) until the establishment furnishes assurances satisfactory to the Secretary that all slaughtering and handling in connection with slaughter of livestock shall be in accordance with such a method.

§ 678. Non-Federal jurisdiction of federally regulated matters; prohibition of additional or different requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are

adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

APPENDIX F

The federal regulations from the Food Safety and Inspection Service, Department of Agriculture, 9 C.F.R. § 300, *et. seq.*, provide in relevant part:

9 C.F.R. § 302.3 Livestock and products entering official establishments.

All livestock and all products entering any official establishment and all products prepared, in whole or in part, therein, shall be inspected, handled, stored, prepared, packaged, marked, and labeled as required by the regulations in this subchapter.

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9 C.F.R. § 309.2 Livestock suspected of being diseased or affected with certain conditions; identifying suspects; disposition on post-mortem inspection or otherwise.

* * *

(b) All seriously crippled animals and non-ambulatory disabled livestock shall be identified as U.S. Suspects and disposed of as provided in § 311.1 of this subchapter unless they are required to be classed as condemned under § 309.3. Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions.

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9 C.F.R. § 309.3 Dead, dying, disabled, or diseased and similar livestock.

(a) Livestock found to be dead or in a dying condition on the premises of an official establishment shall be identified as U.S. Condemned and disposed of in accordance with § 309.13.

(b) Livestock plainly showing on ante-mortem inspection any disease or condition that, under Part 311 of this subchapter, would cause condemnation of their carcasses on post-mortem inspection shall be identified as U.S. Condemned and disposed of in accordance with § 309.13.

(c) Any swine having a temperature of 106° F. or higher and any cattle, sheep, goats, horses, mules, or other equines having a temperature of 105° F. or higher shall be identified as U.S. Condemned. In case of doubt as to the cause of the high temperature, or when for other reasons a Program employee deems such action warranted, any such livestock may be held for a reasonable time under the supervision of a Program employee for further observation and taking of temperature before final disposition of such livestock is determined. Any livestock so held shall be reinspected on the day it is slaughtered. If, upon such reinspection, or when not held for further observation and taking of temperature, then on the original inspection, the animal has a temperature of 106° F. or higher in the case of swine, or 105° F. or higher in the case of other livestock, it shall be condemned and disposed of in accordance with § 309.13.

(d) Any livestock found in a comatose or semicomatose condition or affected with any condition not otherwise covered in this part, which would preclude release of the animal for slaughter for human food, shall be identified "U.S. Condemned" and disposed of in accordance with § 309.13, except that such animal may be set apart and held for further observation or treatment under supervision of a Program employee or other official designated by the area supervisor and for final disposition in accordance with this part.

(e) Establishment personnel must notify FSIS inspection personnel when cattle become non-ambulatory disabled after passing ante-mortem inspection. Non-ambulatory disabled cattle that are offered for slaughter must be condemned and disposed of in accordance with § 309.13.

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9 C.F.R. § 309.5 Swine; disposal because of hog cholera.

(a) All swine found by an inspector to be affected with hog cholera shall be identified as U.S. Condemned and disposed of in accordance with § 309.13. Immediate notification shall be given by the inspector to the official in the Veterinary Services unit of the Animal and Plant Health Inspection Service who has responsibility for the control of swine diseases in the State where the swine are located.

(b) All swine, even though not themselves identified as U.S. Suspects, which are of lots in which one or more animals have been condemned or identified as

U.S. Suspect for hog cholera, shall, as far as possible, be slaughtered separately and apart from all other livestock passed on ante-mortem inspection.

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9 C.F.R. § 309.13 Disposition of condemned livestock.

(a) Except as otherwise provided in this part, livestock identified as U.S. Condemned shall be killed by the official establishment, if not already dead. Such animals shall not be taken into the official establishment to be slaughtered or dressed; nor shall they be conveyed into any department of the establishment used for edible products; but they shall be disposed of in the manner provided for condemned carcasses in Part 314 of this subchapter. The official U.S. Condemned tag shall not be removed from, but shall remain on the carcass until it goes into the tank, or is otherwise disposed of as prescribed in Part 314 of this subchapter, at which time such tag may be removed by a Program employee only. The number of such tag shall be reported to the veterinary medical officer by the inspector who affixed it, and also by the inspector who supervised the tanking of the carcass.

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9 C.F.R. § 309.15 Vesicular diseases.

(a) Immediate notification shall be given by the inspector to the local, State, and Federal livestock

sanitary officials having jurisdiction when any livestock is found to be affected with a vesicular disease.

(b) No livestock under quarantine by State or Federal livestock sanitary officials on account of a vesicular disease will be given ante-mortem inspection. If no quarantine is invoked, or if quarantine is invoked and later removed, upon ante-mortem inspection, any animal found to be affected with vesicular exanthema or vesicular stomatitis in the acute stages, as evidenced by acute and active lesions or an elevated temperature, shall be identified as U.S. Condemned and disposed of in accordance with § 309.13.

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9 C.F.R. § 311.1 Disposal of diseased or otherwise adulterated carcasses and parts; general.

(a) The carcasses or parts of carcasses of all animals slaughtered at an official establishment and found at the time of slaughter or at any subsequent inspection to be affected with any of the diseases or conditions named in this part shall be disposed of according to the section pertaining to the disease or condition: Provided, That no product shall be passed for human food under any such section unless it is found to be otherwise not adulterated. Products passed for cooking or refrigeration under this part must be so handled at the official establishment where they are initially prepared unless they are moved to another official establishment for such handling or in the case of products passed for refrigeration are moved for

such refrigeration to a freezing facility approved by the Administrator in specific cases: Provided, That when so moved the products are shipped in containers sealed in accordance with § 318.10(c) of this subchapter or in a sealed means of conveyance as provided in § 325.7 of this subchapter. Owning to the fact that it is impracticable to formulate rules covering every case and to designate at just what stage a disease process or a condition results in adulteration of a product, the decision as to the disposal of all carcasses, organs, or other parts not specifically covered in this part shall be left to the veterinary medical officer. The veterinary medical officer shall exercise his judgment regarding the disposition of all carcasses or parts of carcasses under this part in a manner which will insure that only wholesome, unadulterated product is passed for human food.

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9 C.F.R. § 313.1 Livestock pens, driveways and ramps.

* * *

(c) U.S. Suspects (as defined in § 301.2(xxx)) and dying, diseased, and disabled livestock (as defined in § 301.2(y)) shall be provided with a covered pen sufficient, in the opinion of the inspector, to protect them from the adverse climatic conditions of the locale while awaiting disposition by the inspector.

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9 C.F.R. § 313.2 Handling of livestock.

* * *

(d) Disabled livestock and other animals unable to move.

(1) Disabled animals and other animals unable to move shall be separated from normal ambulatory animals and placed in the covered pen provided for in § 313.1(c).

(2) The dragging of disabled animals and other animals unable to move, while conscious, is prohibited. Stunned animals may, however, be dragged.

* * *

APPENDIX G

California Penal Code § 599f. Nonambulatory animals; slaughter houses, stockyards, auctions, market agencies, or dealers; transactions; processing; euthanasia; movement; violations

(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.

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

(d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.

(e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

(f) No person shall sell, consign, or ship any nonambulatory animal for the purpose of delivering a nonambulatory animal to a slaughterhouse, stockyard, auction, market agency, or dealer.

(g) No person shall accept a nonambulatory animal for transport or delivery to a slaughterhouse, stockyard, auction, market agency, or dealer.

(h) A violation of this section is subject to imprisonment in a county jail for a period not to exceed one year, or by a fine of not more than twenty thousand dollars ($20,000), or by both that fine and imprisonment.

(i) As used in this section, "nonambulatory" means unable to stand and walk without assistance.

(j) As used in this section, "animal" means live cattle, swine, sheep, or goats.

(k) As used in this section, "humanely euthanize" means to kill by a mechanical, chemical, or electrical method that rapidly and effectively renders the animal insensitive to pain.