No. 10-224

In The
Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

KAMALA D. HARRIS, ET AL.,

Respondents.

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

SUPPLEMENTAL BRIEF OF PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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RULE 29.6 STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

RESPONSE TO BRIEF OF UNITED STATES

As the United States both demonstrates and agrees, the Federal Meat Inspection Act expressly preempts Section 599f, and the Ninth Circuit clearly erred in holding otherwise. But even though the United States concludes that "this Court could productively review the case at this stage," US Br. 20, the final two paragraphs of its 24-page brief say that the case does not fit the "traditional criteria warranting certiorari," *id.* 22, and suggest that a denial of certiorari "may leave open the possibility that the concerns discussed above could be addressed through the application of conflict preemption principles," *id*. 23. With respect, that analysis is not only incorrect (as we detail below), it ignores the very reason why the FMIA and its express preemption clause were enacted.

Congress passed the FMIA to *prevent* adulterated food and contagious animal diseases from wreaking health and economic havoc *ex ante*, not to fix "widespread economic harm and disruption of the meat supply," US Br. 20-21, *after* it happens. It included an express preemption clause in the FMIA so there would not have to be a drawn-out conflict-based preemption analysis. And where, despite that clearly expressed Congressional intent, a state nonetheless attempts to regulate animal handling and inspection in a way that is "different than" federal law (rather than working through the federal system, in the ways the United States explains it could, US Br. 17), the only way to stop that interference is by means of a preliminary injunction enforcing the federal law. The

will of Congress will be thwarted – and all of the human and animal health and economic ills that Congress sought to avoid come into play – if this Court were to decide not to take this case because it is "interlocutory."

Unlike speculation about what the State "might" do to ameliorate the conflict (which, the United States notes, even if done "could not save Section 599f from express preemption," US Br. 22), the health and economic threat posed by non-inspection of non-ambulatory swine is documented and very real. As the United States agrees, FMIA regulations are critical to the early detection of vesicular diseases such as foot and mouth disease, which has devastated livestock in the United Kingdom (in 2001)[1] and South Korea (currently).[2] Almost 3,000,000 swine a year are slaughtered in California; they arrive there – are "received" from – virtually every Western state, and it only takes one uninspected sick pig to start an epidemic. The federal system of ante-mortem inspection has thus far worked to prevent the outbreak of such disease in the United States, but for the first time

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[1] http://footandmouth.csl.gov.uk/.

[2] Foreign Agricultural Service, USDA, *Int'l Agricultural Trade Report* (Feb. 9, 2011), http://www.fas.usda.gov/info/WebStories/Formatted%20IATR%20South%20Korea%20FMD%202011.pdf; Evan Ramstad & Jaeyeon Woo, *Foot and Mouth Disease Roils Korean Farms*, Wall Street Journal, Jan. 11, 2011, http://online.wsj.com/article/SB10001424052748703791904576075341212752096.html.

since passage of the FMIA that safety net will disappear if the current injunction is vacated.

There is, moreover, good reason for the Court to credit the concerns voiced by Petitioner and echoed by its amici (all of which are acknowledged by the United States): NMA members' employees and the members of the American Association of Swine Veterinarians are, under the FMIA's system, the "first line" when it comes to the inspection and handling of livestock at a federally-inspected facility; they know firsthand the importance of what they do and what can happen if they don't do it. They are also, as the United States acknowledges, the people who will be "caught in the middle" between the requirements of federal law and the very different provisions of state law. *See* US Br. 22. It is NMA member employees and the swine veterinarians who will be subject to a $20,000 fine and a year in prison if they allow antemortem inspection of nonambulatory animals. Those penalties make the California law virtually self-enforcing. But that is exactly backwards: Congress has expressly stated that, as a matter of federal law, these handlers and inspectors are not to be put "at loggerheads" with different state laws; they are to follow the federal regulations. Failure to review and reverse the Ninth Circuit's decision now will not just directly undercut the safety and health concerns behind the FMIA's inspection and handling provisions; it will negate the very purpose of the express preemption clause.

I. CONGRESS INTENDED FMIA PREEMPTION TO PREVENT STATE LAWS FROM TAKING EFFECT

By including an express preemption provision in the FMIA, Congress intended state laws regarding handling and inspection to be nullified *before* they took effect and created problems. It passed the FMIA to detect animal diseases before they became epidemics and to prevent adulterated food from ever entering the nation's food supply, *see* 21 U.S.C. § 602, not to "wait and see" whether harm arises and fix the problems after they occur. Congress thus made clear it did not want to leave the question of preemption, as the United States suggests "may" be "possib[le]," to the uncertain "application of conflict-preemption principles." *See* US Br. 23. Rather, Congress intended for preempted state laws to be invalidated *before* an actual problem arose, whether that be the spread of disease through livestock populations and the attendant human health concerns, *id.* 20-21, "widespread economic harm and disruption of the meat supply," *id.*, or "state officials and FSIS inspectors at loggerheads over basic matters of slaughterhouse operations," *id.* 21.

The Ninth Circuit's stay of its mandate has temporarily preserved the preliminary injunction order and the status quo of federal law that the Ninth Circuit vacated, but only pending this certiorari petition. If the Court denies review now, the California law will go into effect, and all of the threats to public health and welfare – threats that the United

States admits could "destabilize the Nation's meat supply by devastating livestock populations," US Br. 10 – will be unleashed, for the first time. Such potentially devastating consequences cannot be reconciled with Congress' intent, especially where, as here, the United States agrees that the issue of express preemption is ripe for review at this stage, *id.* 20, and further development of the record below on this purely legal issue would not change the parties' positions or the Ninth Circuit's ruling against express preemption.

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE

Despite acknowledging real and potentially devastating public health concerns if Section 599f is not invalidated, *see* US Br. 20-21, the United States says the Ninth Circuit's decision "presently affects only California, where a relatively small fraction of the Nation's slaughtering takes place." *Id.* 22. That statement, however, ignores the fact that, as the United States admits elsewhere in its brief, the federally-inspected hog slaughterhouses located in California are engaged in substantial interstate commerce – both with respect to the receipt of swine from other states and the shipment of meat and meat products to other states. *Id.* 16. At just one federally-inspected hog slaughterhouse in California, for example, hogs are received from Arizona, Colorado, Nebraska, Texas, and Utah. C.A. App. 885 (Terrill Decl. ¶ 4). Under Section 599f, however, a nonambulatory

pig with a communicable disease transported to California from, say, Colorado, cannot be "received" and must instead be turned away to some other location, despite the animal's suffering and the potential to spread disease along the way.

Similarly, the United States recognizes that ante-mortem inspection is important because certain serious and highly contagious diseases are only detectable while the animal is alive. *See* US Br. 21 n.6; *see also* American Ass'n of Swine Vets. Amicus Br. ("Swine Vets Br.") 7-10. Detection of such diseases in a nonambulatory pig may mean that the *entire herd of origin* is affected, and alerts an inspector to test for that disease in other, apparently healthy and ambulatory pigs not yet manifesting symptoms which would otherwise be slaughtered for human consumption. *See* Pet. 13, 31-33; Swine Vets. Br. 4-6. It also triggers notice to animal health officials at USDA's Animal and Plant Health Inspection Service to investigate and, if appropriate, establish a quarantine. *See* FSIS Directive 6000.1 (rev. 1, Aug. 3, 2006). If Section 599f goes into effect, however, federal inspectors can no longer "hold" an animal for ante-mortem inspection and must instead, under threat of criminal penalties, "take immediate action to . . . euthanize the animal." Cal. Penal Code § 599f(c). As a result, disease will go undetected, no quarantine will be established, and the potentially infected animals not yet manifesting symptoms will be processed, packaged for sale, and distributed not just to consumers in California, but across the Nation. This is, of course,

directly contrary to the very purpose of the FMIA: to prevent adulterated food from entering the Nation's food supply.

The United States has acknowledged these real and substantial public health concerns. *See* US Br. 20-21. So too have the veterinarians – those who actually conduct inspections under the federal regime and thus are closest to the issue. *See* Swine Vets. Br. 4-10. The veterinarians unequivocally stated that Section 599f "threatens the public health by preventing ante-mortem inspection of 'downer' swine," "places the health of both swine and humans at unnecessary risk," and significantly interferes with the veterinarians' ability to do their job. *Id.* 10-11.

Importantly, the veterinarians' concerns were raised by a *national* association, with members throughout the country – the very people charged with and relied upon by USDA and FSIS to implement the FMIA at federally-inspected slaughterhouses. Given their knowledge and expertise, and their proximity to the issues at the heart of this case, the veterinarians' concerns should be credited by this Court. *See* US Br. 21 n.6 (relying on same).

Moreover, although the percentage of hogs slaughtered in California may appear "relatively small" when viewed as a percentage of the Nation's total (approximating 2% to 2.5% of the total), that percentage translates to almost 3,000,000 hogs slaughtered

on an annual basis,[3] of which it only takes *one* nonambulatory hog carrying an undetected communicable disease to pose a grave risk to animal health and the Nation's meat supply. This is particularly significant given that, at just one California slaughterhouse, approximately 225 hogs become nonambulatory and must pass federal ante-mortem inspection *each day*. CA App. 886 (Terrill Decl. ¶ 12).

III. THE NINTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *RATH PACKING* AND APPLIES THE PRESUMPTION AGAINST PREEMPTION INCONSISTENTLY WITH OTHER CIRCUITS

The Ninth Circuit's decision also presents a conflict that squarely "implicate[s] a division of appellate authority" and meets "traditional criteria warranting certiorari" under Rule 10. *Cf*. US Br. 11, 22. The Ninth Circuit has decided the express preemption issue "in a way that conflicts with [a] relevant decision[ ] of *this Court*," and that is a compelling ground for review. Sup. Ct. R. 10(c) (emphasis added).

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[3] *See* Nat'l Agric. Stats. Serv., USDA, *California Livestock Review* (Apr. 29, 2011), http://www.nass.usda.gov/Statistics_by_State/California/Publications/Livestock/201104lvsrv.pdf (2,708,000 annualized total commercial hogs slaughtered in California based on March 2011 data); *see also* CA App. 869 (Meat & Poultry Facts 2008 (2,570,300 hogs slaughtered for commercial purposes in California during 2007)).

In *Jones v. Rath Packing Co*., 430 U.S. 519 (1977), this Court interpreted identical, parallel language in the same express preemption provision at issue here – 21 U.S.C. § 678 of the FMIA – and held that "explicitly stated in the statute's language" was Congress' "unmistakably . . . ordained" intent that Section 678 be given a "broad meaning." *Id*. at 525, 540. As a result, this Court held that "th[e] explicit pre-emption provision dictates the result in th[is] controversy;" because the state's requirement "is 'different than' the federal requirement," the state law provisions "are pre-empted by federal law." *Id.* at 530-32. That same preemption language should also have dictated the result here, but instead the Ninth Circuit held just the opposite, giving "this provision a *narrow* interpretation," and holding that "[t]here is no express preemption here." Pet. App. 8a, 11a (emphasis added). Such a failure to follow one of this Court's decisions is, of course, one of the "traditional" grounds for granting review. "Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari." E. Gressman, et al., *Supreme Court Practice*, at 250 (9th ed. 2007); *see, e.g., Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (certiorari granted "[b]ecause the Ninth Circuit's holding is in direct conflict with our precedents").[4]

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[4] Similarly,

> where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of

(Continued on following page)

Moreover, although the United States properly highlights the "misguided" and "misconceived" nature of the Ninth Circuit's opinion, US Br. 10, 20, it fails to note *what led* the Ninth Circuit to misinterpret the FMIA's preemptive scope so egregiously: an improper invocation of the presumption against preemption. That presumption was central to the Ninth Circuit's decision, and it said so: "Consistent with the presumption against preemption, we must give this provision a narrow interpretation." Pet. App. 8a. That presumption drove the Ninth Circuit to "twist[ ] the language [of Section 678] beyond the breaking point" (even though such manipulation of Section 678 was expressly forbidden by *Rath Packing*, 430 U.S. at 532) to try to show Section 599f did not impose different requirements for animal handling and inspection. *Cf.* US Br. 11-20 (detailing the ways "Section 599f would dictate how federally regulated slaughterhouses must conduct operations involving nonambulatory animals," which the Ninth Circuit's "reason[ing] . . . ignore[s]").

> the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status – particularly if the lower court's decision is patently incorrect and the interlocutory decision, such as a preliminary injunction, will have immediate consequences for the petitioner.

E. Gressman, *supra*, at 281 (citing cases); *see, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (granting review where interlocutory Ninth Circuit "decision is clearly erroneous under our precedents" and "has created a real threat of [immediate] consequences"). *See also* Pet. 37.

The Ninth Circuit's invocation of and explicit reliance on the presumption against preemption puts it at one end of a myriad of conflicting opinions across the circuits as to the presumption's proper application. *See* Pet. 27-31. This confusion, grounded as the circuits have recognized in the "ongoing disagreement among Supreme Court jurists as to if, when, and how this presumption applies," Pet. 5-6 (quoting *Demahy v. Actavis, Inc.*, 593 F.3d 428, 434 (5th Cir. 2010), *cert. granted*, 131 S.Ct. 817 (Dec. 10, 2010) (No. 09-1501)), has not been clarified this Term.[5]

The Ninth Circuit's conflict with *Rath Packing* and explicit reliance upon the presumption against preemption pose important federal questions that fall squarely within the Court's traditional criteria for granting certiorari and compel review here.

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[5] *Cf. Bruesewitz v. Wyeth LLC*, 131 S.Ct. 1068 (2011); *Chamber of Commerce v. Whiting*, No. 09-115, slip op. (May 26, 2011). The only mention of the presumption against preemption in those cases occurred in *Bruesewitz,* where it was invoked in a passing footnote by the two dissenting justices. *Bruesewitz*, 131 S.Ct. at 1094 n.15 (Sotomayor, J., dissenting). At this writing, *PLIVA, Inc. v. Mensing*, 588 F.3d 603 (8th Cir. 2009), *cert. granted*, 131 S.Ct. 817 (Dec. 10, 2010) (No. 09-993), with which Nos. 09-1039 and 09-1501 have been consolidated, has not yet been decided.

IV. NEITHER THE STATE NOR THE LOWER COURTS CAN AMELIORATE THE EXPRESS PREEMPTION CONCERNS

Finally, delayed review will not result in an "amelioration" here. First and most importantly, as the United States correctly notes, neither the exercise of "suitable discretion" nor a narrow interpretation of terms such as "nonambulatory" or "immediate" will "save Section 599f from express preemption." US Br. 22.

Second, the criminal penalties at issue here – a year's imprisonment and $20,000 fine – essentially make California's law self-enforcing. As the United States recognizes, slaughterhouse operators and employees are likely to "submit to the California law" given the threat of criminal penalties, and "FSIS inspectors themselves could in principle be criminally charged." *Id.* 22. Such realities "will force the official to change his conduct." *Camreta v. Greene*, No. 09-1454, slip op. at 7 n.4 (May 26, 2011). Nor is there any reason to think prosecutors will restrain themselves in enforcing the law. The amendment to Section 599f was proposed with formal support from the California District Attorneys Association, with one district attorney testifying to the state legislature that "Californians should demand that law enforcement be given the tools they need." C.A. App. 197, 247-48. In California, district attorneys have

independent prosecutorial authority,[6] so it is highly doubtful any "ameliorating" interpretation offered by the State would be binding, and no such interpretation has been offered in the more than two years since the amendment's effective date in any event. And as the United States has observed, while any such limitation "could not save Section 599f from express preemption," the State's "silence . . . amplifies the concern that Section 599f will intrude on the federal scheme if it goes into effect." US Br. 22.

As the United States has also recognized, further litigation before the district court without action by this Court will not lead even to a belated correction of the Ninth's Circuit's error. *Id.* 23 n.7. An unlikely ruling on other preemption grounds would not change its fundamental failing on express preemption, and in the meantime all of the consequences noted above will have come into play.[7] Accordingly, no possibility of amelioration lessens the imperative that the Court grant certiorari, and that it do so now.

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[6] "[T]he district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings." *People v. Dehle*, 83 Cal. Rptr. 3d 461, 465 (Cal. Ct. App. 2008).

[7] Similarly, while a rulemaking petition by one respondent is currently pending, *see* Pet. 38 n.17, the United States rightly observes it "would not, if granted, moot this case," and preemption issues would continue to persist. US Br. 17.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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