No. 10-224

In The Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

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

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether California's prohibition against slaughterhouses receiving and slaughtering nonambulatory swine for human consumption is preempted by the Federal Meat Inspection Act, which regulates certain aspects of the meat inspection process.

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INTRODUCTION AND SUMMARY OF REASONS TO DENY THE PETITION

Respondents oppose the petitioner's request for certiorari. Petitioner alleges no circuit split on any of the issues raised in the petition. Petitioner does argue that the Ninth Circuit's approval of California's law prohibiting introduction of nonambulatory livestock into the food supply is a "radical expansion" of cases out of the Fifth and Seventh Circuits, but this overstates the differences among the cases, and overlooks that all three circuits reached the same conclusion that state laws prohibiting processing of certain types of meat are not preempted by the Federal Meat Inspection Act.

Additionally, contrary to petitioner's argument, there is no conflict with *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977), which interpreted different preemption provisions. And, the Ninth Circuit decision in this case properly applies the general standard set in *Rath Packing*. Nor is there any confusion as to when or how to apply the presumption against preemption, as alleged by petitioner. The presumption against federal preemption, is especially well-established where the state law involves the state's police power over health and safety. The Ninth Circuit properly applied the law when it determined that California's prohibition against processing nonambulatory livestock for human consumption is valid and not preempted by federal law.

Nor was petitioner's action below a case of extraordinary national importance, as there has been very little litigation regarding application of *Jones v. Rath Packing Co.* in the last thirty years. There is nothing in the record to support petitioner's argument of an "immediate risk to human health and safety" from the ruling. In fact, all evidence is to the contrary, that the California law that was upheld *addresses and potentially resolves* a health risk.

Even if there were a valid traditional argument for review, this case would be a poor vehicle by which to address the preemption issues petitioner asserts, because the case comes to this Court on a preliminary injunction ruling, and several of the arguments made by petitioner revolve around factual issues that are not fully addressed in the evidentiary record. Perhaps after further time in the trial court, the evidentiary context would be better developed. At the present time, it is at best premature to consider this case.

Finally, many of the issues raised by petitioner as reasons for review focus on the merits of this case. But the Ninth Circuit correctly decided the preliminary injunction motion, and there is nothing in the record, or in the petition, to warrant review by this Court.

STATEMENT OF THE CASE

A. California Penal Code Section 599f

In January 2008, the Humane Society of the United States released an undercover video of a California slaughterhouse. Appendix (App.) A at p. 4a. The video depicted images of sick and disabled cows ("downer" or "nonambulatory animals") being dragged by forklifts, kicked, and electro-shocked on their way to slaughter. *Id.* "Public health professionals warned that meat from "downer" cows was more likely to be diseased, partly because animals can become non-ambulatory due to disease and partly because downer animals grow sicker as they end up rolling around in other animals' refuse." *Id.* Upon further investigation, it was discovered that the meat from these cows had been processed and had entered the food supply. Subsequent to the video's release, the largest beef product recall in the history of the United States took place due to the risks posed by this meat, deemed by the USDA as unfit for consumption. *Id*.; *see also* 9 C.F.R. §§ 309.2, 309.13.

"Public health professionals have long warned that meat derived from downed animals has a much increased susceptibility to passing on the E. coli virus, mad cow disease, and salmonella – all of which can lead to severe human health complications and even death." Paul Krekorian Statement to the California State Assembly Committee on Public Safety; Arguments in Support of Assembly Bill 2098 at p. 3 (April 23, 2008). 143 million pounds of beef had been

processed and sold by the plant, 37 million pounds of which had been distributed to school lunch programs. *Id.* Assembly Bill 2098 (AB 2098), a bill to amend section 599f of the California Penal Code, was introduced to prohibit the purchasing, slaughter, and sale of nonambulatory animals for consumption. The bill provided that a violation of these provisions would be punishable by imprisonment for up to a year and a fine of no more than $20,000. *See* Cal. Penal Code § 599f (West 2009).

The bill amended section 599f to provide in particular:

> (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.

The purpose of AB 2098 was to strengthen California's ability to protect people, people's health, the

food supply and animals. Paul Krekorian Statement to the California State Assembly Committee on Public Safety; Arguments in Support of Assembly Bill 2098 at p. 3 (April 23, 2008). AB 2098 was supported by the Humane Society of the United States, the Humane Farming Association, California Cattlemen's Association, State Humane Association of California, the American Society for the Prevention of Cruelty to Animals, and the California Federation for Animal Legislation. *Id.* at p. 2. The California District Attorneys Association also supported AB 2098. There was no registered opposition. Petitioner did not oppose the statute on the record. *Id.* The measure was signed into law on July 22, 2008 and would have become effective January 1, 2009.

Shortly before amended section 599f was to take effect, petitioner filed suit in federal district court against the State of California, Attorney General Brown and Governor Schwarzenegger, seeking declaratory and injunctive relief barring the application of section 599f to federally inspected swine slaughterhouses.[1] *Id.* App. A at p. 5a. Petitioner 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

[1] The American Meat Institute successfully intervened as a plaintiff as well, but did not join in or file a motion for preliminary injunction and was not a party to the appeal in the Ninth Circuit or this petition for certiorari.

on preemption grounds. The State Defendants filed an interlocutory appeal in the Ninth Circuit. [2]

B. Proceedings Below

The Court of Appeals reversed the lower court and found that there is no likelihood that NMA will succeed on its express preemption claim. App. A at pp. 9a, 17a. As recited by the court, regulations pursuant to the FMIA require nonambulatory animals to be classified as "U.S. Suspect" and held for further examination. *Id.* at p. 8a; *see also* 9 C.F.R. § 309.2(b). If the downer animal shows signs of diseases, it must be classified as "U.S. Condemned" and disposed of according to specific procedures. *Id.*; *see also* §§ 309.4-309.18. But, if the animal passes inspection, the federal regulations do not prohibit slaughter and sale for human consumption. *Id.*; *see also* § 309.2.

The Court of Appeals noted that the FMIA contains an express preemption provision (21 U.S.C. § 678[3]), but that this provision "explicitly preserves

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[2] The Humane Society of the United States, Farm Sanctuary Inc., Humane Farming Association and the Animal Legal Defense Fund ("Defendant-Intervenors") successfully intervened as defendants. Defendant-Intervenors opposed the motion as well and appealed to the Ninth Circuit.

[3] "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).

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 this chapter, with respect to any other matters regulated under this chapter.' 21 U.S.C. § 678." App. A at pp. 8a-9a.

The Ninth Circuit found that there was no express preemption because section 678 of the FMIA preempts state regulation of the "premises, facilities and operations" of slaughterhouses. App. A at p. 9a. Section 599f(a)-(c) deals with none of these, but instead regulates the kind of animal that may be slaughtered. App. A at p. 9a. As the Ninth Circuit noted, two circuits have similarly held that the FMIA does not preempt state laws that regulate the kind of animal that may be slaughtered. App. A at p. 9a; *see 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).

The Ninth Circuit found that "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." App. A at p. 11a.

Additionally, the Ninth Circuit determined that NMA would likely not succeed on its claim that there was implied preemption concerning section 599f's ban on the receipt and slaughter of nonambulatory animals. App. A at p. 11a. The court found to be decisive the provision that "[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." *Id.* at p. 12a. The court found that this language in section 678 "shows that Congress did not intend to occupy the field of slaughterhouse regulation, so only conflict preemption is at issue." The court noted that conflict preemption is a demanding standard and courts will not seek out conflicts between state and federal regulations where none exists. *Id.*

The court found that it was not physically impossible to comply with both section 599f and the FMIA. *Id.* FMIA inspection requirements apply to animals that will be slaughtered for human consumption, but nothing in the FMIA requires the slaughter of downer animals for human consumption. *Id.* "Federal regulations require inspection *if* downer animals are to be slaughtered." *Id.* Moreover, the court found that section 599f was not an obstacle to accomplishing the purposes of FMIA. The purpose of FMIA, as noted by the court, is 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.'" *Id.* (quoting 21 U.S.C. § 602). The purpose, of the FMIA "is not to preserve the slaughter of any kind of animal for human consumption." *Id.* at pp. 13a-14a. Nor did Congress establish an unlimited choice of what kinds of animals to slaughter for individual slaughterhouses. *Id.* at p. 14a.

The court determined that nothing in section 599f serves as an obstacle to the FMIA. *Id.* Nothing in the record suggests that the requirements of section 599f "were so onerous and confusing that it put slaughterhouse compliance with federal inspection standards at risk." *Id.* The court rejected NMA's argument that section 599f "will prevent the examination of downer animals for disease, hindering federal procedures designed to identify and stem the spread of disease" because nothing in the record substantiated this concern. *Id.* at p. 15a n.7.

The court did find that one provision, section 599f(e) was likely preempted because it prohibits conduct – dragging unconscious downer animals – that federal law does not. *Id.* at p. 15a. Additionally, the FMIA deems more equipment suitable for moving downer animals – such as electric prods – than does section 599f(e). However, at this preliminary injunction stage "NMA failed to offer any evidence on [the issue of irreparable injury]" with respect to section 599f(e) and did not show that the balance of equities and the public interest tipped in its favor as to this provision. App. A at p. 17a.

REASONS FOR DENYING THE PETITION

A. There Is No Conflict Among the Circuits

There is no split of authority on the FMIA preemption issue, and petitioner does not argue to the contrary. The two circuits to have previously considered the issue, now joined by the Ninth Circuit in this matter, have held that state laws prohibiting processing of certain types of meat are not preempted by the FMIA. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007) (state ban on horse slaughter not preempted by similar Meat Inspection Act); *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326 (5th Cir. 2007) (same). Petitioner argues that the Ninth Circuit decision in this case is a "radical expansion" of the "horsemeat" cases, but this is an overstatement. *See* Pet. at pp. 34-36.

As the Ninth Circuit noted, federal regulations require inspection *if* downer animals are to be slaughtered, but the regulations do not require the slaughter of downer animals. *See Cavel*, 500 F.3d at 553-554 (FMIA applied to any horsemeat slaughtered for human consumption, but it did not require states to allow horses to be slaughtered for human consumption); *Empacadora De Carnes De Fresnillo*, 476 F.3d at 333 ("[t]his 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"). In *Cavel Int'l*, the Seventh Circuit noted that horsemeat

production must comply with the FMIA, but if horsemeat is not produced, "there is nothing, so far as horse meat is concerned, for the [FMIA] to work upon." 500 F.3d at 554.

Similarly, here, the Ninth Circuit recognized that California has limited the slaughter and production of certain types of animals – nonambulatory animals – sold for human consumption, by prohibiting purchase, sale or processing of such animals. The Ninth Circuit decision is in accord with the decisions of the only other two circuits to have dealt with a similar issue.

Petitioner claims that the court of appeals decision in this case is a "radical expansion" of *Cavel* and *Empacadora De Carnes De Fresnillo* because the Ninth Circuit tries to "broaden the 'type of meat' distinction so as to also extend to a State the ability to regulate the 'kind of animal' that may be slaughtered." Pet. at p. 35. However, the Ninth Circuit dealt with this argument in its opinion, finding that a state is "not limited to excluding animals from slaughter on a species-wide basis." App. A at p. 10a. In fact, the Ninth Circuit posited that a state could for example ban the slaughter of domesticated animals while allowing the slaughter of wild dogs and horses – it therefore found no logical reason why a state could not regulate what kinds of animals could be slaughtered based on "practical, moral and public health judgments that go far beyond those made in the FMIA." *Id*.

Moreover, the argument that federal law sets the sole standard for activities occurring on the grounds of a federally-regulated slaughterhouse, (Pet. at p. 35) is not precise. For example, the fact that a horse strayed into the grounds of a federally-regulated slaughterhouse in Illinois or Texas, would not mean that the FMIA would determine whether that animal could be slaughtered for human consumption. Under *Cavel* and *Empacadora*, state-law limitations on such slaughter would apply. Similarly, in California, a downer animal, on the grounds of a federally-regulated slaughterhouse, is not allowed to be processed for human consumption.[4] Since the downer livestock cannot be processed for human consumption, the food processing portions of the FMIA simply do not come into play. Thus, the Ninth Circuit's decision is a logical extension of the "horsemeat" cases, not the "radical expansion" claimed by petitioner.

For all these reasons, the petition presents no split in authority of any type because the three circuits to deal with the federal meat inspection preemption issue, the Fifth, Seventh, and now the Ninth, have all reached the same conclusion.

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[4] *Rath* and *Armour*, cited by plaintiff, are both limited to cases dealing with "marking, labeling, . . . or ingredient requirements" and do not support plaintiff's argument that merely stepping into a federally-regulated slaughterhouse means that an animal must be slaughtered pursuant to the FMIA. Pet. at p. 35, (citing *Rath Packing*, 430 U.S. at 525, 532 and *Armour & Co. v. Ball*, 468 F.2d 76, 84 (6th Cir. 1972)).

B. There is No Conflict with Any Decision of This Court

The purported conflict with *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, alleged by petitioner simply does not exist. Pet. at pp. 21-27. The Ninth Circuit decision in this case noted the presumption against preemption in language taken directly from *Rath Packing*: "Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, [citations omitted], '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.'" *Rath Packing Co.*, 430 U.S. at 525; *see* App. A at p. 8a.

Although petitioner acknowledges the presumption against preemption, it argues nonetheless that this Court held that the "FMIA was a specific example of 'Congress having "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.'" Pet. at p. 19. Petitioner's assertion does not accurately reflect the holding or reasoning of *Rath Packing*.

Petitioner's reliance on *Rath Packing* and *Armour* (Pet. at p. 19), is misplaced, as those cases dealt with preemption of state statutes regarding the "marking, labeling, packaging, or ingredient requirements" portion of section 678 – state regulation in these areas is expressly preempted, but are not at issue

here. Nowhere in *Rath Packing* did this Court state that the FMIA as a whole is an instance where Congress unmistakably ordained that only the FMIA should regulate any part of commerce. The FMIA itself is directly to the contrary, clearly anticipating areas where the federal statute will not govern: "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.

Rather, *Rath Packing* held that the particular state law at issue was preempted because the FMIA prohibits any "marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made" under the FMIA. *Rath Packing*, 430 U.S. at 531. The state law in *Rath Packing Co.* allowed the removal of food products, bacon, and flour in that case, when the average net weight was less than the net weight stated on the package. *Id.* at 522. However, it was shown that the state measured weight by a different method than specified in the FMIA, and the producers of bacon and flour had correctly measured the weight of their product. *Id.* at 526-528, 531-532. Thus, this Court found a direct conflict between what the state allowed regarding labeling and what the FMIA allowed – and determined that FMIA preempted the state law. *Id.* at 531. Contrary, to petitioner's argument here (Pet. at pp. 19, 21-22), there was no over-arching holding in *Rath Packing* that the FMIA always preempts state laws.

Moreover, petitioner does not persuade in its argument that *Rath Packing* requires that the FMIA preemption provision be given a "broad meaning" and that *Rath Packing* is at odds with the "narrow interpretation of the Ninth Circuit." Pet. at pp. 22-27. Giving a "broad meaning" to the FMIA preemption provision was an argument made by respondents in *Rath Packing Co.*, and was not a "holding" by this Court. *Rath Packing*, 430 U.S. at 540. The facts of the *Rath Packing* case dealt specifically with labeling, and this Court compared the labeling requirements of the state law with the labeling requirements required under federal law and found that the state law had "different" requirements. *Id.* at 526-528, 531-532. The facts of *Rath Packing* are inapposite to this case because, at issue here, is a state law limiting animals that may be processed for human food, on the one hand, and the FMIA provision dealing with the "premises, facilities, and operations of any establishment," on the other. The Ninth Circuit, correctly decided that section 599f does not require any "different" procedures on the "premises, facilities, and operations of any establishment."

C. There is No Confusion About When or How to Apply the Presumption Against Preemption

There is a strong presumption against federal preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy

Clause starts with the basic assumption that Congress did not intend to displace state law."). This is particularly true where the state law concerns traditional areas that come within the police power, such as health and safety laws. *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-1195 (2009).

A court must presume that a state statute is not preempted, and the *moving party* has the burden of overcoming that presumption. *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 661-662 (2003) (emphasis added). Moreover, the presumption against preemption applies regardless of whether the plaintiff asserts that a law is expressly or impliedly preempted. *Wyeth*, 129 S.Ct. at 1195 n.3 ("We rely on the presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state law causes of action.'") (citations omitted).

Petitioner argues that the question of when a presumption against preemption should apply has been a topic of recent debate within this Court (Pet. at pp. 29-31), but even if the assertion were true, the presumption was not dispositive of the Ninth Circuit's decision.

The cases petitioner cites to support its argument are inapposite. For example, in *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008), the majority of this Court expressly applied the presumption against preemption and stated that "we 'wor[k] on the

assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Id.* (citations omitted). And in *Cuomo v. Clearing House Ass'n*, 129 S.Ct. 2710 (2009), this Court did not invoke the presumption against preemption, because preemption so clearly applied. *Id.* at 2721. There was no question in *Cuomo* that preemption existed, and there was accordingly no need to invoke the presumption against preemption. The cases cited by petitioner do not demonstrate any meaningful confusion about the presumption against preemption.

Moreover, contrary to petitioner's portrayal, the Ninth Circuit's decision does not rest on the presumption against preemption alone. App. A at p. 8a. The court noted that

> [c]onsistent with the presumption against preemption, we must give this provision a narrow interpretation . . . *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 this chapter, with respect to any other matters regulated under this chapter."*

Id. at pp. 8a-9a (emphasis added). Thus, contrary to petitioner's argument (Pet. at pp. 29-31), there is more to the Ninth Circuit's reasoning than a mere reliance upon the presumption against preemption – the court viewed the presumption along with the

"saving" clause in the statute to come to the proper conclusion that there was no express preemption. *Id.* at p. 9a.

D. This is Not a Case of National Importance

Unable to identify any circuit split or any real conflict with a decision of this Court, petitioner asserts that California law creates an immediate risk to human health and safety. Pet. at pp. 31-34; *see also* Motion for Leave to File Brief as *Amici Curiae* and Brief of the American Association of Swine Veterinarians and the National Pork Producers Council as *Amici Curiae* in Support of Petition for Writ of Certiorari ("Amici Br.") at pp. 2-12. This is simply not the case, and indeed, the argument turns the record on its head.

Petitioner argues that "emergency response actions such as segregation or quarantine will be significantly delayed" for diseases identified post-mortem. Pet. at p. 32. But, the Ninth Circuit properly disposed of this argument, stating, "[n]othing in the record substantiates this concern, and section 599f doesn't prohibit post-mortem inspection of downer animals." App. A at p. 15a n.7.

As to ante-mortem inspection, the regulations cited by petitioner, 9 C.F.R. §§ 309.5, 309.15, do not require an ante-mortem inspection. Rather § 309.5 only requires that all swine with hog cholera shall be identified as "U.S. Condemned" and disposed of in a specified manner. Indeed, section 309.15 specifically *prohibits* ante-mortem inspection of livestock under

quarantine by State or Federal livestock sanitary officials on account of a vesicular disease.[5] If the quarantine is revoked (or none was in place), then any animal affected by vesicular problems "shall be identified as U.S. Condemned." *Id.* Livestock identified as U.S. Condemned "shall be killed by the official establishment, if not already dead" unless otherwise provided. 9 C.F.R. § 309.13. Thus, section 599f interferes with none of these important health protections in the federal regulations.

Similarly, petitioner's amici argue that ante-mortem inspection is essential to detect certain diseases, and "some of this information can only be determined by viewing the animal in motion during the ante-mortem inspection." Amici Br. at p. 6. Amici contend that the ante-mortem inspection consists of two steps: (1) observing animals at rest, and (2) observing animals in motion. Amici Br. at pp. 7-10. This concern, however, ignores the definition of "non-ambulatory" which means an animal "unable to stand and walk without assistance." *See* Cal. Penal Code § 599f(i). It would be impossible to observe the nonambulatory swine in motion under amici's proposed scenario because, by definition, the animal

[5] Section 309.15 does require immediate notification to local, state, and federal livestock sanitary officials having jurisdiction when any vesicular disease is found. 9 C.F.R. § 309.15. This does not conflict with any provision in section 599f, and thus there is no conflict with the health protections provided in the federal regulation.

would not be moving. Moreover, notwithstanding petitioner's and amici's arguments to the contrary, on this preliminary injunction record, there is no evidence that the provisions of section 599f conflict with any federal regulation or directive regarding ante-mortem inspection. App. A at pp. 13a n.5, 15a n.7.

The claim that there is "immediate risk to animal and human health and safety" by section 599f reaches too far and is not supported by the record in this case. Pet. at pp. 31-34. A similar rule and regulation to section 599f was adopted by the federal government with respect to the immediate humane euthanization of nonambulatory cattle. The Federal Safety and Inspection Service (FSIS) noted that this rule was changed to reduce uncertainty in determining the proper disposition of nonambulatory disabled cattle and would eliminate the time FSIS public health veterinarians spend determining whether or not an animal can be tagged as "U.S. Suspect," proceed to slaughter, and then be re-inspected after slaughter, thereby increasing the time inspection program personnel can focus on other inspection activities. 74 Fed. Reg. 11463. Thus, the FSIS determined that it would be *better* to immediately euthanize downer cattle so inspectors could spend more time on other inspections. *Id.* The record in this case, as developed, does not provide evidence on this subject, but on remand the record could be developed to show that less ante-mortem inspection of nonambulatory swine could be good for the food supply – contrary to petitioner's current argument.

E. In any Event, This Case is Not a Good Vehicle for Consideration of the Issues Presented

This case is not a good vehicle for consideration of the issues asserted because the case comes to this Court on a preliminary injunction order, and several of the arguments made by plaintiff revolve around issues not established in the record. At the present time, it is premature, at best, to consider this case. The Ninth Circuit reversed the lower court and found that there is no likelihood of express or implied preemption. App. at pp. 9a, 11a-15a, 17a. Nonetheless, in one narrow respect, the Ninth Circuit found that section 599f(e) was likely preempted because it prohibited conduct – dragging unconscious downer animals – that federal law does not. *Id.* at p. 15a. Additionally, the FMIA deems more equipment suitable for moving downer animals – such as electric prods – than does section 599f(e). However, "NMA failed to offer any evidence on [the issue of irreparable injury]" with respect to section 599f(e) and did not show that the balance of equities and the public interest tipped in its favor as to this provision. App. A at p. 17a. On remand to the district court, whatever may be the district court's eventual decision on these issues upon consideration of further evidence, there is likely to be a further appeal.

F. The Court of Appeals' decision was correct

Many of petitioner's reasons for granting the petition revolve around its disagreement with the

merits of the decision issued by the Ninth Circuit. Pet. at pp. 24-27, 31-36. In addition to not presenting a compelling basis for further review, the Ninth Circuit's decision is well-reasoned and properly applies established law. First, the Ninth Circuit correctly held that there is no express preemption of state regulation of slaughterhouses in the manner provided in Section 599f.[6] To the contrary, Congress has expressly invited state regulation in this area that is consistent with federal law. Second, the Ninth Circuit correctly concluded that "NMA's implied preemption claim concerning section 599f's ban on the receipt and slaughter of nonambulatory animals fares no better" than its express preemption claim. App. A at p. 11a. The court correctly held that it was physically possible to comply with both section 599f and the FMIA. *Id.* at pp. 12a-14a. Additionally, the court correctly determined that nothing in section 599f serves as an obstacle to the FMIA's objective of safeguarding the quality of meat available for human consumption. *Id.*

[6] As respondents have acknowledged, the Ninth Circuit did find that one narrow portion of the law, section 599f(e) was likely preempted, but the court deferred consideration of the issue pending a showing by plaintiff of any prejudice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: December 15, 2010

Respectfully submitted,

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