No. 10-224

In the Supreme Court of the United States

NATIONAL MEAT ASSOCIATION, PETITIONER

v.

KAMALA D. HARRIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, expressly preempts any state law that imposes a "[r]equirement[] within the scope of [the Act] with respect to premises, facilities and operations" of any slaughterhouse inspected under the Act that is "in addition to, or different than" requirements under the Act. 21 U.S.C. 678. The question presented is whether that provision preempts California Penal Code § 599f, which requires, *inter alia*, the immediate euthanasia of non-ambulatory swine at slaughterhouses subject to the Act.

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This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Since 1907, federal law has regulated a broad range of activities at slaughterhouses to ensure the safety of meat and meat food products. See Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1260. That law has been amended several times and is now designated as the Federal Meat Inspection Act (FMIA or Act), 21 U.S.C. 601 *et seq.* The FMIA regulates matters such as the humane handling and slaughter of livestock, the ante-mortem selection of animals suitable for slaughter for human food, the post-mortem inspection of carcasses, the marking and labeling of meat and meat food products, and

sanitary conditions for slaughtering and processing. See 21 U.S.C. 603-604, 607-608. In many States, essentially all slaughterhouses are subject to the FMIA. See 21 U.S.C. 610; but see 21 U.S.C. 661(a) (permitting cooperative federal-state implementation of state inspection regimes for slaughterhouses producing meat only for intrastate consumption); 21 U.S.C. 623(a) (exempting certain "[p]ersonal slaughtering and custom slaughtering").

Two components of the FMIA's scheme are particularly relevant here. First are its ante-mortem and post-mortem inspections. The Act directs the Secretary of Agriculture (USDA) to inspect animals "before they shall be allowed to enter into any slaughtering * * * establishment" and requires that those animals that "show symptoms of disease" be "set apart and slaughtered separately" from other animals. 21 U.S.C. 603(a). The FMIA further directs USDA to make "a post mortem examination and inspection of the [slaughtered animal] carcasses and parts thereof * * * to be prepared * * * as articles of commerce which are capable of use as human food." 21 U.S.C. 604. USDA is authorized to make "such rules and regulations as are necessary for the efficient execution of the provisions of [the FMIA]." 21 U.S.C. 621.

Second, in the Humane Methods of Slaughter Act of 1958 (HMSA), Pub. L. No. 85-765, 72 Stat. 862, Congress established a federal policy regarding the humane handling and slaughter of livestock. HMSA declares that "[n]o method of * * * handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane," and it authorizes USDA to "designate methods * * * of handling in connection with slaughter which, with respect to

each species of livestock, conform to th[at] policy." HMSA §§ 2, 4(b), 72 Stat. 862-863 (7 U.S.C. 1902, 1904(b)).

As originally enacted, HMSA applied only to "[federal] procurement and price support programs and operations." HMSA § 3, 72 Stat. 862. In 1978, Congress extended HMSA to all federally inspected slaughterhouses by "amend[ing] the Federal Meat Inspection Act to require that meat inspected and approved under such Act be produced only from livestock slaughtered in accordance with humane methods." Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, 92 Stat. 1069 (HMSA 1978). In particular, Congress amended the FMIA to require USDA to make "an examination and inspection of the method by which [livestock] are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under [the FMIA]," and to authorize USDA to refuse inspection at a slaughtering establishment if livestock "have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with the [HMSA]." HMSA 1978 § 2, 92 Stat. 1069 (adding 21 U.S.C. 603(b)). Congress also directly required slaughterhouses to comply with the HMSA. HMSA 1978 § 3, 92 Stat. 1069 (amending 21 U.S.C. 610).

b. The Food Safety and Inspection Service (FSIS), an agency in USDA, administers all aspects of the FMIA, including inspections and humane-handling requirements. See 9 C.F.R. 300.1 *et seq*. The regulations pertaining to humane handling establish, *inter alia*, standards for the good repair of slaughterhouse facilities to avoid injury to livestock; practices for humanely driving animals within the establishment; and rules for the humane handling of diseased or disabled animals. See gen-

erally 9 C.F.R. 313.1-.2. The regulations pertaining to ante-mortem and post-mortem inspection establish a system of identifying certain animals as condemned and unsuitable for human food; identifying other animals as potentially unsuitable for human food (in whole or in part), subject to further examination; and passing other animals for slaughter. See generally 9 C.F.R. Pts. 309-310.

In particular, animals showing on ante-mortem inspection symptoms of certain diseases or conditions are classified as "U.S. Condemned." 9 C.F.R. 309.3-.9, .15-.16; see 9 C.F.R. 301.2. Such animals may not be used as human food, and they must be killed apart from the slaughtering facilities where human food is produced. 9 C.F.R. 309.13. Their carcasses must be handled and disposed of so as not to adulterate products for human consumption. See 9 C.F.R. Pt. 314.

Animals found or suspected on ante-mortem inspection to be affected with certain other diseases or conditions are classified as "U.S. Suspect." 9 C.F.R. 309.2(c)-(h) and (j)-(*l*); see 9 C.F.R. 301.2. In addition, "seriously crippled animals and non-ambulatory disabled livestock shall be identified as U.S. Suspects." 9 C.F.R. 309.2(b).[1] U.S. Suspects "shall be set apart and shall be slaughtered separately from other livestock." 9 C.F.R. 309.2(n); see FSIS Directive 6900.1 (rev. 1, Nov. 2, 1998) (Part Two I.A.1.k). As a matter of humane handling, U.S. Suspects (including nonambulatory disabled animals) must be kept in a covered pen with access to water

[1] Nonambulatory disabled full-grown cattle are the exception to this rule. Such animals are condemned because the inability to walk is a symptom of bovine spongiform encephalopathy ("mad cow disease"). See 9 C.F.R. 309.3(e); 69 Fed. Reg. 1862 (2004); 72 Fed. Reg. 38,700 (2007); 74 Fed. Reg. 11,463 (2009)

(and if held more than 24 hours, feed), pending observation and disposition by the FSIS inspector. 9 C.F.R. 313.1(c); see 9 C.F.R. 313.2(d)-(e) (governing treatment of "animals unable to move").

For swine, the observation period and ante-mortem inspection allow inspectors to determine if the affected animals have a communicable disease that signals a threat to the larger swine population. For example, 9 C.F.R. 309.15 requires federal inspectors to notify local, state, and federal livestock sanitary officials "when any livestock is found to be affected with a vesicular disease," which includes the highly communicable and potentially economically devastating foot-and-mouth disease.

The carcasses of animals classified as "U.S. Suspect" are ultimately disposed of as provided in 9 C.F.R. Part 311. Those regulations guide FSIS inspectors' discretion in determining upon post-mortem examination which parts, if any, of a suspect carcass may be salvaged as unaffected by the disease or condition that warranted the animal's identification as "U.S. Suspect"—and thus may be processed into meat and meat food products for human consumption.

After slaughter and post-mortem inspection, slaughterhouses and other establishments butcher and process carcasses into meat products. FSIS inspectors examine those products and the establishments in which they are prepared to determine if the products are "adulterated," a term embracing a wide range of conditions that make meat unsuitable for use as human food. See 21 U.S.C. 606(a) (Supp. III 2009) (requiring inspections); 21 U.S.C. 601(m) (defining "adulterated"); 9 C.F.R. Pt. 318 (implementing regulations).

c. The Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967), amended the FMIA and added the express preemption provision at issue in this case:

> Section 408. Requirements within the scope of this Act [*i.e.*, the FMIA] with respect to premises, facilities and operations of any establishment at which inspection is provided under . . . this Act, which are in addition to, or different than those made under this Act may not be imposed by any State.

§ 16, 81 Stat. 600 (21 U.S.C. 678). That provision also includes a savings clause: "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." *Ibid.*

2. As originally enacted, California Penal Code § 599f prohibited certain actors from "buy[ing], sell[ing], or receiv[ing] a nonambulatory animal," Cal. Penal Code § 599f(a) (West 1995), or "hold[ing] a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises," *id.* § 599f(b). Section 599f(a) by its terms did not apply to slaughterhouses "inspected by [USDA]"; Section 599f(b) did not contain such a clause, and so apparently applied to all slaughterhouses, though USDA is unaware of any prosecution in connection with a federally inspected slaughterhouse. A violation was punishable by a maximum of six months of imprisonment and/or a $1000 fine. *Id.* §§ 19, 599f(d) (West 1995).

Section 599f was amended in 2008. 2008 Cal. Legis. Serv. ch. 194 (West). The amendment extended Section 599f(a)'s existing bans to all slaughterhouses, including those that are federally inspected. Cal. Penal Code § 599f(a). It required immediate euthanizing of any non-

ambulatory animal. *Id.* § 599f(c). It added a prohibition on "process[ing], butcher[ing], or sell[ing] meat or products of nonambulatory animals for human consumption." *Id.* § 599f(b). And it increased the maximum penalty for violating Section 599f to one year of imprisonment and a $20,000 fine. See *id.* § 599f(h).[2]

3. Petitioner is an association of meat packers and processors, including operators of swine slaughterhouses. Compl. ¶¶ 2-3, 7. Petitioner sued California officials seeking to prevent the enforcement of Section 599f against federally inspected swine slaughterhouses.

The district court granted petitioner's motion for a preliminary injunction preventing enforcement of Section 599f at any federally inspected swine slaughterhouse. Pet. App. 18a-53a. The court concluded that 21 U.S.C. 678 expressly preempts Section 599f because the California law "alters the process and methods for the receipt of animals, the determination of the animal as 'disabled' or 'nonambulatory,'" and the rules regarding "handling of the nonambulatory animal." Pet. App. 36a-37a. The court explained that the FMIA and its implementing regulations "permit a slaughterhouse to set aside for further inspection an animal that is nonambulatory," but that Section 599f "expressly requires that the same animal be

[2] The 2008 amendment preserved Section 599f(e)'s regulation of how slaughterhouses may move nonambulatory animals: "While in transit or on the premises of a * * * 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." The court of appeals agreed that petitioner was likely to succeed on the merits of its preemption challenge to Section 599f(e), but it vacated the preliminary injunction and remanded for findings about irreparable injury and the balance of the equities with respect to Section 599f(e) in particular. Pet. App. 16a-17a. The parties do not challenge that narrow remand order.

'immediately' euthanized." *Id.* at 37a. The court therefore held that Section 599f "imposes inspection requirements upon federally inspected slaughterhouses which are in addition to or different than FMIA," and is expressly preempted by 21 U.S.C. 678. Pet. App. 37a.

The district court rejected respondents' argument that a nonambulatory animal is a "type of meat" that a State could choose to exclude from being introduced into the human food supply altogether, as it might with "horse meat or dog meat or rat meat." Pet. App. 38a-39a. "A pig is a pig. A pig that is laying down is a pig. * * * California permits pigs to be produced for human consumption," and "[h]aving allowed pigs and swine to enter the food supply, California cannot alter the federally mandated requirements of inspection." *Id.* at 39a. The district court also concluded that Section 599f conflicts with the FMIA "because it alters the federally mandated procedure once an animal is identified as disabled." *Id.* at 42a-43a. The district court declined to reach petitioner's additional arguments that Section 599f is unconstitutionally vague and violates the Commerce Clause. *Id.* at 43a.

The district court entered a preliminary injunction. Pet. App. 44a-52a. It found that petitioner "is faced with an immediate threat of irreparable harm" from the conflict between Section 599f and the FMIA and the threat of criminal penalties. *Id.* at 48a. The court found the equities favored enjoining enforcement of Section 599f in light of 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." *Id.* at 52a.

4. a. The court of appeals vacated the preliminary injunction and remanded. Pet. App. 1a-17a. It first con-

cluded that 21 U.S.C. 678 does not expressly preempt Section 599f because, in the court's view, Section 599f does not address the "premises, facilities [or] operations" of slaughterhouses, but rather "regulates the kind of animal that may be slaughtered." Pet. App. 9a. The court reasoned that "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." *Ibid.*

The court of appeals criticized the district court's analysis as limiting a State to "excluding animals from slaughter on a species-wide basis." Pet. App. 10a. It concluded instead that a State is free to "decide which animals may be turned into meat" based on "a host of practical, moral and public health judgments that go far beyond those made in the FMIA." *Ibid.* The court acknowledged that "a state may go too far in regulating what 'kind of animal' may be slaughtered," if it "effectively establish[es] a parallel state meat-inspection system" by "styl[ing] new [inspection] standards as a regulation of the 'kind of animal' that may be slaughtered." *Id.* at 10a-11a. But the court decided this case did not require it to "decide what limits the express preemption provision places on such regulations." *Id.* at 11a.

The court of appeals also concluded that Section 599f survived analysis under principles of conflict preemption. The court pointed out that "[i]t's not physically impossible to comply with both section 599f and the FMIA," as "nothing in the FMIA *requires* the slaughter of downer animals for human consumption," and "no slaughterhouse operator would be fined by federal authorities if he gave nonambulatory animals medical care and put them up for adoption as pets." Pet. App. 12a. Rather, on the

court's understanding, "[f]ederal regulations require inspection *if* downer animals are to be slaughtered." *Ibid.*

b. The court of appeals denied petitioner's petition for rehearing, Pet. App. 57a-59a, but stayed its mandate pending disposition of the certiorari petition, see *id.* 54a-56a; Fed. R. App. P. 41(d)(2)(B). Accordingly, the district court's preliminary injunction remains in force.

DISCUSSION

The court of appeals erred in holding that the FMIA does not expressly preempt the challenged portions of Section 599f. The court's reasoning that Section 599f is spared because it regulates the "kinds of animal" that may be slaughtered, Pet. App. 9a, is misguided. What matters is that Section 599f imposes "requirements" "with respect to" slaughterhouse "operations" that are "within the scope of [the FMIA]" but that are "in addition to, or different than" requirements prescribed under the FMIA. 21 U.S.C. 678. Section 599f is therefore expressly preempted.

Section 599f intrudes on a federal scheme designed not only to ensure the safety of particular carcasses for human consumption, but also to implement a national policy of humane handling and to detect diseases (*e.g.*, foot-and-mouth disease) that could destabilize the Nation's meat supply by devastating livestock populations. The decision below thus threatens to disrupt the federal inspection regime, or else put state officials and FSIS inspectors at loggerheads over basic matters of slaughterhouse operations. A correct application of 21 U.S.C. 678 would resolve all those concerns in straightforward fashion in favor of the federal regime. Under the traditional considerations, however, this Court's review is not

warranted. The Ninth Circuit's decision is interlocutory and does not implicate a division of appellate authority. Moreover, it presently affects only California, where a relatively small fraction of the Nation's swine slaughter is conducted, and it is possible that conflicts with the federal regime could be minimized.

A. The Federal Meat Inspection Act Expressly Preempts Section 599f As Applied To Swine Slaughterhouses

The court of appeals erred in concluding that 21 U.S.C. 678 does not expressly preempt the challenged portions of Section 599f as applied to swine slaughterhouses. The court of appeals' reasons for that holding are unpersuasive and ignore the simple fact that Section 599f would dictate how federally regulated slaughterhouses must conduct operations involving nonambulatory animals.

1. The FMIA preempts state "[1] [r]equirements [2] within the scope of [the FMIA] [3] with respect to premises, facilities and operations of any establishment at which inspection is provided under [the FMIA], [4] which are in addition to, or different than those made under [the FMIA]." 21 U.S.C. 678. The portions of Section 599f challenged here satisfy each of those conditions.

Requirements. The mandatory language of Section 599f makes clear it states "requirements" in the ordinary sense of the word. As explained in detail below, most of the challenged portions of Section 599f—the bans on "receiv[ing]" and "hold[ing]" nonambulatory swine, and on "process[ing]" and "butcher[ing]" their meat—are direct regulations of slaughterhouse activities committed to exclusive federal control through 21 U.S.C. 678.

Whether Section 599f(b)'s ban on "sell[ing] meat or products of nonambulatory animals for human consump-

tion" is a "requirement" under 21 U.S.C. 678 calls for further analysis. The FMIA does not in general expressly preempt state regulation of the commercial sales activities of slaughterhouses (though the second sentence of 21 U.S.C. 678 preempts "[m]arking, labeling, packaging, [and] ingredient requirements," see *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 528-532 (1977)). But in the context of Section 599f's other prohibitions, the sale ban cannot fairly be understood as mere economic regulation of a commercial market. Moreover, the record here is that the sales ban was in fact intended to regulate slaughtering activities through economic pressure. As the sponsor of the 2008 amendment explained, the revised Section 599f "will create an economic disincentive to [certain slaughterhouse] practices [regarding nonambulatory animals] by prohibiting the sale of any meat or products from such animals." C.A. App. 289. The sales ban in Section 599f therefore is as much a "requirement" "with respect to" slaughterhouse "operations" as Section 599f's other provisions.

This Court has recognized that the word "requirement" in an express preemption provision has expansive reach. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), interpreted an express preemption clause providing that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to [certain aspects of cigarette promotion]." *Id.* at 515. The *Cipollone* plurality found that provision to "sweep[] broadly," and emphasized that it embraced common-law damage actions because "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling pol-

icy." *Id.* at 521 (citation omitted); accord *id.* at 548-549 (opinion of Scalia, J.). The underlying principle is that, where federal supremacy is concerned, a state law that by design exerts clear economic pressure on a federally regulated activity is no less a "requirement" than a naked regulation would be. That principle logically applies whether the state law is a criminal ban (as here) or a cause of action in tort (as in *Cipollone*).

Within the scope of the FMIA. The challenged provisions of Section 599f are within the "scope" of the FMIA. Spatially, a slaughterhouse subject to the FMIA embraces delivery vehicles once they have entered its premises, see FSIS Directive 6900.2 (rev. 1, Nov. 25, 2003) (Part I V.B), as well as "every part of [the] establishment" where "meat food products [are] prepared for commerce," 21 U.S.C. 606(a) (Supp. III 2009). Thus, for the entire time the animal is within the slaughterhouse's premises, the animal and its products are within the physical scope of the FMIA's application.

Furthermore, each stage of slaughterhouse operations at which Section 599f might apply is within USDA's expansive regulatory authority under the FMIA:

- USDA regulates the humane handling of swine—whether nonambulatory disabled, nonambulatory but not disabled, or otherwise—upon the animals' arrival at the slaughterhouse, even before the animals are identified to FSIS for inspection. See, *e.g.*, 44 Fed. Reg. 68,813 (1979) (promulgating 9 C.F.R. 313.1-.2, regulating humane handling); see also FSIS Directive 6100.1 (rev. 1, Apr. 16, 2009) (VIII.A.1) ("All animals that are on the premises of the establishment, on vehicles that are on the premises, or animals being handled in connection with slaughter (e.g., livestock on trucks being

staged for slaughter) are to be handled humanely.").[3]

- The ante-mortem inspection of nonambulatory swine presented to FSIS for inspection is subject to longstanding regulations under the FMIA. See, *e.g.*, 35 Fed. Reg. 15,554 (1970) (promulgating Part 309 ante-mortem inspection regulations and Part 311 disposition regulations on the authority of, *inter alia*, the FMIA).
- The processing and butchering of carcasses into meat and meat food products is regulated under the FMIA. See, *e.g.*, 35 Fed. Reg. at 15,554 (promulgating Part 318 processing regulations on the authority of, *inter alia*, the FMIA).

Accordingly, the provisions of Section 599f addressing the same subjects are also within the scope of the FMIA.

With respect to operations. The provisions of Section 599f address slaughterhouse "operations." The FMIA contains two preemption provisions and a savings clause in 21 U.S.C. 678, which divide the Act's concerns into several subject matters: "premises, facilities and operations"; "recordkeeping"; "[m]arking, labeling, packaging, [and] ingredient requirements"; and "other matters." In

[3] The fact that USDA's Part 313 humane-handling regulations reflect a policy originally enacted by Congress in a law separate from the FMIA does not place those regulations outside "the scope of [the FMIA]," 21 U.S.C. 678. Congress itself announced in HMSA 1978 that it was "amend[ing] the [FMIA] to *require* that meat inspected and approved *under such Act* be produced" in accordance with the policy in HMSA. Pmbl., 92 Stat. 1069 (emphasis added). And USDA understood in promulgating the Part 313 humane-handling regulations that it was "amend[ing] the Federal meat inspection regulations to implement Pub. L. 95-445," *i.e.*, the HMSA 1978, which amended the FMIA. 44 Fed. Reg. at 68,809.

that context, the "operations" of a slaughterhouse are best understood as "action[s] done as a part of practical work or involving practical application of a * * * process" at the slaughterhouse. *Webster's New International Dictionary* 1707 (2d ed. 1958). Section 599f's requirements are "with respect to" such operations just as the FMIA's humane-handling and inspection requirements are. Both federal and California law address practical aspects of how animals must be handled by the slaughterhouse in connection with slaughter, and the conditions under which processing of the carcasses into meat and meat food products must occur.[4]

In addition to, or different than. Section 599f's requirements regarding nonambulatory swine are not the same as those prescribed under the FMIA. FSIS regulations do not prohibit the receipt or holding of nonambulatory swine; to the contrary, they contemplate that such animals will be received and address how they will be humanely handled and held. See 9 C.F.R. 309.2(b) (governing nonambulatory disabled livestock); FSIS Directive 6900.1 (Part One VI.C; Part Two I.D) (same); 9 C.F.R. 313.2(a)-(c) (governing driving of livestock). Likewise, there is no flat prohibition in USDA regulations on processing the meat of nonambulatory swine for sale; rather, there is a system of ante-mortem and post-mortem inspections designed to pass carcasses of nonambulatory swine for human consumption in whole or in

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[4] The FMIA's savings clause therefore does not rescue Section 599f. It permits States to "mak[e] requirements or tak[e] other action, consistent with [the FMIA], with respect to any other matters regulated under [the FMIA]." 21 U.S.C. 678. Because Section 599f seeks to regulate slaughterhouse "operations" properly "within the scope of [the FMIA]," it cannot be said to regulate the "other matters" preserved by the savings clause. *Ibid.*

part if possible. See 9 C.F.R. 309.2(n); 9 C.F.R. Pt. 311; see also *Rath Packing*, 430 U.S. at 530-532 (applying the "in addition to, or different than" language in the second sentence of 21 U.S.C. 678).

2. The congressional findings that preface the FMIA explain the need for federal inspection of meat bound for interstate and foreign commerce:

> 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.

21 U.S.C. 602. Because "the major portion [of meat and meat food products] moves in interstate or foreign commerce," *ibid.*, achieving the FMIA's purposes requires a regulatory regime for slaughterhouses that is generally uniform and unencumbered by state-to-state variations.

Reflecting a balance of interests, however, the FMIA does not subject every aspect of slaughterhouse regulation to national uniformity. For example, the savings clause in 21 U.S.C. 678 provides that the States retain authority over "other matters" not addressed in the express preemption clauses, so long as their laws are "consistent with" the FMIA. The FMIA also authorizes cooperative federal-state implementation of state meat-inspection regimes for slaughterhouses producing meat only for intrastate consumption. See 21 U.S.C. 661(a). That provision was added to the FMIA in 1967 in the same amendment that introduced the express preemp-

tion provision. See Wholesome Meat Act §§ 15, 16, 81 Stat. 595, 600.

If a State is concerned only about meat inspection at intrastate slaughterhouses, it may seek FSIS approval of an intrastate inspection regime, as described above. Twenty-seven States have done so; California is not among them. See FSIS, *List of Participating States*, http://www.fsis.usda.gov/regulations_&_policies/Listing_of_Participating_States/index.asp (Aug. 13, 2007). Alternatively, any interested person (including a State) may petition USDA to revise its FMIA inspection regulations (or to use authorities other than the FMIA to regulate slaughterhouse operations). See 9 C.F.R. Pt. 392. Indeed, USDA has been quite active on matters concerning nonambulatory animals: Through a series of measures in 2004, 2007, and 2009, USDA has required the condemnation of nonambulatory disabled full-grown cattle. See note 1, *supra*. And USDA recently solicited comment on two rulemaking petitions to extend that cattle rule to veal calves, or—of relevance to petitioner's members who operate swine slaughterhouses—to all livestock. 76 Fed. Reg. 6572 (2011).[5]

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[5] The pending rulemaking petition regarding all livestock would not, if granted, moot this case. That petition asks only for a rule that nonambulatory disabled animals "be condemned and humanely euthanized in accordance with 9 C.F.R. 309.13." Farm Sanctuary, *Petition to Amend 9 C.F.R. § 309(e)* 2, http://www.fsis.usda.gov/PDF/Petition_Humane_Handling.pdf (Mar. 15, 2010). By contrast, Section 599f(c) requires "immediate action to humanely euthanize the animal," without regard to the federal inspection and condemnation procedures that apply to animals once presented for inspection. Thus, even if USDA adopted the rule Farm Sanctuary seeks, at least Section 599f(c) would still be "in addition to, or different than" USDA's regulations under the FMIA, 21 U.S.C. 678, and therefore still subject to the instant challenge.

What a State may not do under the FMIA is engraft its preferred additions onto the federal regime. Yet that is precisely the aim and effect of Section 599f. As the sponsor of the 2008 amendment to Section 599f explained, the amendment was necessary in his view because under "the USDA inspection system, there is * * * no adequate system in place to prevent [nonambulatory disabled] animals from continuing to enter our food supply." C.A. App. 195. The FMIA's preemption provision is intended to restrain such impulses toward disuniformity in the operations of slaughterhouses serving the interstate market.

3. The Ninth Circuit concluded that 21 U.S.C. 678 does not preempt Section 599f because the California law regulates "the kind of animal that may be slaughtered," and the FMIA "doesn't preclude states from banning the slaughter of certain kinds of animals altogether." Pet. App. 9a. That reasoning is wrong because it draws an irrelevant distinction and fails to respect 21 U.S.C. 678's focus on "requirements."

Even if Section 599f is described as regulating a "kind of animal," the law is necessarily put into practice through requirements with respect to slaughterhouse operations within the FMIA's scope. It is therefore expressly preempted. The court of appeals, however, suggested something more was necessary for preemption: It acknowledged that "[i]t is possible that a state may go too far in regulating what 'kind of animal' may be slaughtered," Pet. App. 10a, and it offered hypothetical examples of "kind of animal" regulations that "could effectively establish a parallel state meat-inspection system," *id.* at 11a. But the court offered no statutory basis for its view that only some "kind of animal" regulations would be preempted, nor a principle for discerning which regu-

lations "go too far." *Id.* at 10a. Those analytical gaps reveal that characterizing a state law as regulating what "kind of animal" may be slaughtered is fundamentally unhelpful in deciding whether the FMIA preempts the law.

The court of appeals' "kind of animal" construct was borrowed from *Cavel International, Inc.* v. *Madigan*, 500 F.3d 551 (7th Cir. 2007), cert. denied, 554 U.S. 902 (2008), and *Empacadora de Carnes de Fresnillo* v. *Curry*, 476 F.3d 326 (5th Cir.), cert. denied, 550 U.S. 957 (2007), which both upheld state prohibitions on the slaughter of horses for human consumption. See Pet. App. 9a (explaining the state laws at issue governed only "what types of meat may be sold for human consumption in the first place") (quoting *Empacadora*, 476 F.3d at 333).

Even if it is assumed, *arguendo*, that *Cavel* and *Empacadora* were correctly decided, it is not because horses are a "kind of animal," but rather because the bans at issue did not require anything with respect to slaughterhouse operations within the FMIA's scope. Most obviously, the quality of being a horse is immutable and known to all involved well before the animal is within the physical or regulatory reach of the FMIA. Cf. Pet. App. 39a ("A pig is a pig. A pig that is laying down is a pig."). By contrast, immobility is a mutable characteristic that may change even while the animal is on the premises of a federally regulated slaughterhouse. For example, the record below shows that swine that are nonambulatory upon arrival at a slaughterhouse often suffer only from fatigue and stress and are able to stand and walk after rest and monitoring. See C.A. App. 885 (Terrill Decl. ¶ 5). Conversely, USDA regulations governing the good repair of slaughterhouse facilities illustrate that dis-

abling injury to an animal's limbs on slaughterhouse premises is not unknown. See 9 C.F.R. 313.1. The Ninth Circuit's decision allowing California to regulate slaughterhouse operations based on criteria that can and do manifest after animals are already on a slaughterhouse's premises cannot be squared with the FMIA's prohibition of such state law requirements.

B. This Case Does Not Satisfy The Traditional Criteria For Certiorari

The Ninth Circuit's decision is misconceived and threatens to disrupt the FSIS's inspection activities. Nonetheless, the decision does not implicate a division of appellate authority and its effect is presently limited to California, where a relatively small fraction of the Nation's swine slaughter is conducted. Thus, although this Court could productively review the case at this stage, on balance it does not demand the Court's immediate attention.

1. The federal regulation of slaughterhouses is designed in part to ensure the safety of particular carcasses for human consumption. But it also serves to detect serious diseases—such as foot-and-mouth disease—that may be spreading through livestock populations, threatening widespread economic harm and disruption of the meat

supply.[6] And it implements a uniform federal policy regarding the humane handling of livestock.

The court of appeals' decision to let Section 599f stand could frustrate FSIS's inspection activity in California by requiring immediate euthanasia before ante-mortem inspections are conducted. Even if some ante-mortem inspections went forward, Section 599f could put state officials and FSIS inspectors at loggerheads over basic matters of slaughterhouse operations: What is sufficient to deem an animal "nonambulatory" under Section 599f(c)? How quickly must ante-mortem inspection take place so that an animal believed to be nonambulatory may be "immediate[ly] * * * euthanize[d]" under Section 599f(c)? What if no federal inspector is immediately available? Must federal inspectors reorganize their inspection priorities to accommodate the urgency Section 599f appears to place on euthanasia? What if an animal becomes nonambulatory while in line to be slaughtered?

Similar disputes could arise over humane handling. For example, a federal inspector could conclude that nonambulatory swine that are not disabled, but merely tired and overheated, would most humanely be handled by revival with food, water, and shade. But Section 599f would seem to require immediate euthanasia, even if that

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[6] Ante-mortem inspection in particular is often the best way of detecting such diseases, especially when standard diagnosis requires observing or taking the temperature of a live animal. See generally American Ass'n of Swine Vets. Amicus Br. 4-11. For example, as FSIS's training materials for public health veterinarians explain, the initial clinical symptoms of foot-and-mouth disease for swine are "fever * * *, anorexia, reluctance to move, and squeal[ing] when forced to move," followed by vesicle (blister) formation. FSIS, *Disposition/Food Safety: Reportable and Foreign Animal Diseases* 66 (Jan. 29, 2009). Of those symptoms, only vesicles would be detectable post mortem, and would not be visible at all on a skinned and dressed carcass.

more drastic (and economically wasteful) approach was unnecessary.

Caught in the middle of such a disagreement, slaughterhouse operators or employees facing criminal penalties may submit to the California law, undermining the federal scheme. And although we assume California's prosecutors would exercise suitable discretion, the court of appeals' ruling implies that FSIS inspectors themselves could in principle be criminally charged as well. See Cal. Penal Code § 31 (West 1999) (treating persons who "aid and abet [a crime's] commission, or, not being present, have advised and encouraged its commission" as principals in the crime).

California might ameliorate the situation somewhat (even if it could not save Section 599f from express preemption) by interpreting terms in the statute such as "nonambulatory" and "immediate" in a way that eliminated the most direct conflicts with the federal scheme, described above. But California has not offered such limiting constructions in this litigation, a silence that amplifies the concern that Section 599f will intrude on the federal scheme if it goes into effect.

2. That said, the petition does not satisfy the traditional criteria warranting certiorari. The decision below does not conflict with any other appellate decision, and it presently affects only California, where a relatively small fraction of the Nation's slaughtering takes place: In March of this year, California slaughterhouses handled (by head count) about 2% of the Nation's swine and about 6% of the Nation's other FMIA-regulated species (cattle, calves, sheep, and lambs). 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.

The court of appeals' decision is also interlocutory. It may leave open the possibility that the concerns discussed above could be addressed through application of conflict-preemption principles on a more complete record. See Pet. App. 14a. The court of appeals also left open for remand the questions whether Section 599f is void for vagueness or inconsistent with the Commerce Clause. *Id.* at 6a n.2, 17a.[7] And because Section 599f was enjoined shortly after its effective date, it is presently unclear how aggressively California will enforce it, or how slaughterhouses will react. On the one hand, the pre-amendment version of Section 599f(b) apparently required immediate euthanasia of nonambulatory animals at federally inspected slaughterhouses, yet USDA is unaware of any actual prosecution under the law. On the other hand, the amendment to Section 599f was directed primarily at federally inspected slaughterhouses, and it was justified as addressing perceived inadequacies in USDA's regulations. See p. 18, *supra*.

[7] That said, the Ninth Circuit's opinion casts substantial doubt on the viability of conflict-preemption theories by suggesting (incorrectly) that slaughterhouses can avoid all FSIS oversight by euthanizing a nonambulatory animal and spiriting it away from federal inspectors. See Pet. App. 12a. Moreover, Commerce Clause challenges to state slaughterhouse regulation have generally failed, see *Empacadora*, 476 F.3d at 335-337; *Cavel*, 500 F.3d at 555-558.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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