No. 10-224

In the Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,
Petitioner,

v.

EDMUND G. BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA; STATE OF CALIFORNIA; 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

BRIEF IN OPPOSITION FOR THE NON-STATE RESPONDENTS

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held that the National Meat Association ("NMA") was not entitled to a preliminary injunction on its claim that the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §601 et seq., expressly preempts certain provisions of California Penal Code Section 599f ("§599f"), a statute that prevents the slaughter or abuse of animals too sick, diseased, or injured to stand and walk on their own.

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STATEMENT OF THE CASE

Petitioner National Meat Association ("NMA") sought a preliminary injunction against California Penal Code §599f ("§599f")so that its members can continue to slaughter pigs so sick or injured they cannot stand and walk (often known as "downed" or "nonambulatory" animals), and introduce meat from such animals into the human food supply. Section 599f is an anticruelty law that was amended in the wake of the nation's largest recall of ground beef in 2008. It (1) criminalizes certain treatment, transport, purchase, sale, or receipt of cattle, pigs, sheep, and goats who are too sick, diseased, or injured to stand and walk to slaughter, (2) requires prompt euthanasia to alleviate the suffering of nonambulatory animals, and (3) prohibits the slaughter of nonambulatory animals for human consumption. The Ninth Circuit overturned the district court's grant of the injunction upon determining that §599f is neither expressly nor impliedly preempted by any federal law. Petitioner now seeks review by this Court limited to its express preemption arguments.

The petition does not even attempt to claim a circuit split. Every court of appeals that has considered a similar preemption claim has rejected it. The Ninth Circuit's decision also is perfectly consistent with *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), which interpreted entirely different preemption language that is not at issue in this case. The petition also relies heavily on arguments that were not adequately pressed or passed upon below, and on factual assertions for which petitioner failed to develop any evidence even though it clearly bore the burden of proof in this

interlocutory posture. Nothing about this case merits review by this Court.

1. California Penal Code §599f

California Penal Code §599f was originally enacted in 1994 to prevent the inhumane treatment of animals who are too sick or injured to stand and walk. 1994 Cal. Legis. Serv. ch. 600 at 2961. Former §599f contained three prohibitions:

> (a) No slaughterhouse that is not inspected by the United States Department of Agriculture, stockyard, or auction shall buy, sell, or receive a nonambulatory animal.
>
> (b) No slaughterhouse, stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or remove the animal from the premises.
>
> (c) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

Cal. Penal Code §599f (1995). The statute defined "animal" as "live cattle, swine, sheep, or goats," and "nonambulatory" animals as those "unable to stand and walk without assistance." *Id.* §599f(e), (f).

In 2008, the California Legislature amended §599f in response to undercover videos released by the Humane Society of the United States depicting images of sick and disabled cows being dragged by forklifts,

kicked, and electro-shocked on their way to being slaughtered at a federally-inspected slaughter and processing establishment in California. Kathleen Ragan, *Bill Analysis: Paul Krekorian Statement to the California State Assembly Committee on Public Safety in Support of A.B. 2098* at 3 (Apr. 1, 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2051-2100/ab_2098_cfa_20080328_144343_asm_comm.html. The California Legislature responded to these events by amending §599f to extend the restriction on "buy[ing], sell[ing], or receiv[ing]" nonambulatory animals to federally-inspected slaughterhouses, to prohibit the processing, butchering, and sale of meat from nonambulatory animals, and to require the humane handling of those animals. Cal. Penal Code §599f (2009). Petitioner did not oppose the amendment, which was signed into law on July 22, 2008 and became effective January 1, 2009.

As amended, §599f contains seven prohibitions:

(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.

Id. The amendment also increased the penalties for a violation of the statute. *Id.* §599f(h). The definitions of "animal" and "nonambulatory" were not amended from former §599f. *Id.* §599f(i)–(j).

2. The Federal Meat Inspection Act

There is no general federal law or regulation preventing cruelty to farm animals. *See* 7 U.S.C. §2132(g) (exempting farm animals from the Animal Welfare Act). The Federal Meat Inspection Act ("FMIA") was enacted to protect the health and welfare of meat consumers, and sets forth requirements that govern certain operations at federally-inspected slaughterhouses. 21 U.S.C. §§602-604. The FMIA contains a narrow express preemption provision that provides:

> 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. Congress also included a broad savings clause inviting states to regulate in related areas, so long as the regulations do not impose "[r]equirements within the scope of this chapter with respect to premises, facilities and operations" of a slaughterhouse. *Id.*; *see also id.* ("This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.").

The Secretary of the U.S. Department of Agriculture ("USDA") administers the FMIA through the Food Safety and Inspection Service ("FSIS"). *See, e.g., id.* §§601, 603; 9 C.F.R. §300.2. Under the FMIA, federal personnel inspect animals before they are slaughtered for human food, 21 U.S.C. §603, a procedure known as "ante-mortem inspection." However, only those animals who are presented for slaughter for human food are within the FMIA's domain. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008).

During ante-mortem inspection, federal personnel inspect those animals who are "offered for slaughter." 9 C.F.R. §309.1. If a slaughterhouse chooses to present an animal for inspection, federal inspectors may either (1) pass the animal for slaughter, (2) identify the animal as "suspect," or (3) condemn the animal. 9 C.F.R. §§301.2, 309.2; *see also* FSIS, U.S. Department of Agriculture, *FSIS Directive 6100.1* (Apr. 16, 2009), *available at* http://www.fsis.usda.gov/OPPDE/rdad/

FSISDirectives/6100.1Rev1.pdf (*"FSIS Directive 6100.1"*) (regulating procedures for handling nonambulatory cattle). Notably, though, nothing in the FMIA requires a slaughterhouse to present any particular animal for inspection and slaughter. And for cattle, FSIS regulations specifically allow a slaughterhouse to condemn and destroy nonambulatory cattle before inspection. *FSIS Directive 6100.1* at 5.

3. Proceedings Below

Petitioner filed this action on December 23, 2008 against the State respondents, requesting injunctive relief and a declaration barring application of §599f to federally-inspected swine slaughterhouses in California. Petitioner argued, *inter alia*, that §599f is preempted by the FMIA as it applies to swine and the processing of pork. The Humane Society of the United States ("HSUS") and other organizations successfully intervened as defendants. On February 19, 2009, the district court granted NMA's motion for a preliminary injunction. Pet.App.53a. The court found that petitioner was likely to succeed in its claim that §599f is expressly preempted because the statute "requires *meat products* to be handled in a manner other than that prescribed by the FMIA or the USDA regulations" and therefore "imposes inspection requirements upon federally inspected slaughterhouses which are in addition to or different than FMIA." Pet.App.36a-37a (emphasis added). The district court also held that §599f is impliedly preempted because the FMIA contains "comprehensive requirements for meat inspection, handling and processing" and §599f "imposes different or additional requirements on

inspection, handling and processing meat."[1] Pet.App.42a. The district court did not reach NMA's separate arguments that §599f violates the dormant commerce clause and/or is unconstitutionally vague. Pet.App.43a.

In an interlocutory appeal, the Ninth Circuit reversed the district court's grant of a preliminary injunction. The Ninth Circuit recognized that petitioner's arguments pertained only to a few subsections of §599f (subsections a-c), Pet.App.17a, and held that those provisions are neither expressly nor impliedly preempted by the FMIA because they do not "require *any* additional or different inspections than does the FMIA," and do not regulate "'premises, facilities and operations' of slaughterhouses" within the scope of the FMIA. Pet.App.11a. Instead, §599f(a)-(c) "regulate[] the kind of animal that may be slaughtered." Pet.App.9a. In addition to a careful analysis of the text and purposes of the FMIA, the Ninth Circuit relied on the existing case law which holds, uniformly, that state statutes prohibiting the slaughter of a particular kind of animal are not preempted by the FMIA. *Id.* (citing *Cavel*, 500 F.3d at 554, and *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir.), *cert. denied*, 550 U.S. 957 (2007)).

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[1] The district court further held that plaintiffs were likely to succeed on their claim that §599f(e), a humane handling provision, was preempted. Pet.App.39a-40a. The Ninth Circuit agreed with the district court but held that the plaintiffs had not shown that they would be irreparably injured by that provision or that the balance of equities tipped in favor of granting a preliminary injunction against it. Pet.App.16a-17a. The petition does not seek review concerning §599f(e), nor §§(d), (f), or (g).

With respect to petitioner's implied preemption arguments, the Ninth Circuit recognized that it is "not physically impossible to comply with both section 599f and the FMIA" because "nothing in the FMIA *requires* the slaughter of downer animals for human consumption. . . . Whether they may be slaughtered is up to the states." Pet.App.12a-13a. The court further determined that §599f is not an obstacle to federal policy objectives, because the purpose of the FMIA "is certainly not to preserve the slaughter of any kind of animal for human consumption." Pet.App.13a-14a.

The Ninth Circuit remanded for the district court to consider petitioner's vagueness and dormant Commerce Clause arguments. Pet.App.6a n.2, 17a.

REASONS FOR DENYING THE WRIT

The Ninth Circuit determined that a preliminary injunction is unwarranted because petitioner was unlikely to succeed on its claim that §599f(a)-(c) are preempted by federal law. Pet.App.17a. Petitioner asks this Court to review and overturn that interlocutory decision. But the petition identifies no genuine conflict between the Ninth Circuit's decision and any decision of this Court or of any other court, and no legal or practical issue of broad significance that could possibly merit this Court's review. And the supposed public policy issues the petition identifies are unpersuasive and not appropriately preserved for review.

First, petitioner argues that some provisions of §599f are expressly preempted by the FMIA—although petitioner is carefully vague about exactly which provisions it is challenging. Petitioner does not claim a circuit split on this issue, and is forced to concede that the only two prior decisions addressing

analogous state laws held that those laws *were not* preempted by the FMIA. The Ninth Circuit (Pet.App.9a) correctly held that a restriction on the kinds of animals who may be purchased, received, or slaughtered for human consumption is not a "requirement[] within the scope of this chapter with respect to the premises, facilities, and operations" of slaughterhouses within the meaning of the FMIA's express preemption provision, 21 U.S.C. §678. The FMIA provides no requirements for the inspection of animals who will *not* be slaughtered and placed into interstate commerce for human consumption, and is not offended by a state law removing a class of animals from the food production chain entirely. The FMIA simply requires certain food safety inspections to take place *if* meat is to be introduced into interstate commerce. Petitioner's efforts to distinguish *Empacadora* and *Cavel* mischaracterize the text of the laws at issue in those cases, and ignore the reasoning of the Fifth and Seventh Circuits.

The petition tries to establish a conflict with this Court's decision in *Rath Packing*. But *Rath Packing* involved different preemption language in the FMIA not at issue here, and simply held that a law regulating the content of labels on bacon packaging is clearly a "labeling requirement." 430 U.S. at 532. This Court did not hold that every provision (or every preemption provision) of the FMIA must be interpreted "broadly," or that the Act entirely preempts all state regulation possibly affecting meat production.

Second, petitioner invites this Court to grant review in order to hold that the traditional presumption against preemption has no role to play in express preemption cases. That argument was not

pressed or passed upon below, and is a transparent attempt to manufacture an issue worthy of review where there is none. It is inconsistent with *Rath Packing*, where this Court recognized and applied the general "'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 525 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Petitioner's argument is also inconsistent with several subsequent opinions from this Court recognizing that the presumption against preemption applies in express preemption cases. And in any event this case would be a terrible vehicle to explore the proper contours and limits of the presumption against preemption, because the presumption did no real work in the Ninth Circuit's analysis. The Ninth Circuit made clear that it believed petitioner's preemption arguments were clearly inconsistent with the language, structure, and purposes of the FMIA (indeed, "[h]ogwash"), so this was not a borderline case that was in any way dependent on the presumption. Pet.App.9a-10a.

Finally, the petition's policy arguments are unsupported and seriously exaggerated. Since the petition does not attempt to challenge the provisions of §599f prohibiting transportation of, or commerce in, nonambulatory animals, petitioner's preemption arguments could matter, at most, only for the tiny fraction of animals who become nonambulatory in the interval between arriving at the slaughterhouse premises and being slaughtered. There is notably zero evidence in the record about the number of animals in this group. And even for that *de minimis* unquantified subset, this dispute is essentially academic because

§599f(b) effectively removes all commercial incentive to slaughter downed pigs by completely banning the sale of meat from nonambulatory animals for human consumption.

The petition attempts to create the impression of a conflict between federal objectives and §599f(c)'s requirement for prompt euthanasia of nonambulatory animals by suggesting that federal inspectors must have an opportunity to inspect them while they are still alive, in order to detect potential communicable diseases that allegedly could be harder to detect after the animal is euthanized. These arguments depend on factual premises that petitioner utterly failed to develop below. The petition repeatedly references these supposed public health concerns, but does not contain a single relevant citation to the record or decisions below. That is no accident. Petitioner's briefs in the Ninth Circuit vaguely allude to detection of communicable disease as a concern, but they offered no evidence that the California law would pose any significant obstacle to federal objectives in that area. Indeed, in the trial court below, petitioners argued the exact opposite—that pigs pose no real communicable disease dangers and that §599f interferes for no good reason with the supply of meat. *See, e.g.*, Pet.App.49a-51a; Plaintiff National Meat Association's Mem. in Supp. of Mot. for Prelim. Inj. at 23 (Docket No. 20-1) (E.D. Cal. Dec. 30, 2008) (arguing that the balance of harms weighs in favor of the injunction because "NMA is not aware of any reported health issue related to the nonambulatory status of swine").

Even if petitioner's vague and inconsistent intimations about public health problems were persuasive (they are not) these arguments would be

relevant to a theory of "conflict" or "obstacle" preemption that the petition conspicuously does not advance. This Court cannot and should not attempt to grapple with these complex factual issues in the first instance, in an interlocutory posture, when petitioner defaulted on its burden of proof below and has waived the legal argument (conflict preemption) to which these assertions would be most pertinent.

The Ninth Circuit's interlocutory decision is reasonable, consistent with the rulings of two other Circuits on the same issue of law, and of no broad significance. Certiorari should be denied.

I. THE NINTH CIRCUIT'S DECISION IS CORRECT AND DOES NOT CONFLICT WITH THE PRECEDENTS OF THIS COURT OR ANY OTHER CIRCUIT

In the courts below, petitioner advanced a variety of challenges to different provisions of §599f, including implied conflict preemption arguments suggesting that it was impossible for a slaughterhouse to comply with §599f and federal regulations simultaneously, or that §599f stands as an obstacle to the fulfillment of federal objectives. The Ninth Circuit rejected those arguments and petitioner has, tellingly, abandoned them on certiorari—essentially conceding that §599f does not require a slaughterhouse to violate any requirement actually imposed by federal law, and does not significantly frustrate the fulfillment of federal objectives.[2]

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[2] Petitioner's *amici* continue to press the contention that §599f requires slaughterhouses to violate federal law and that it is impossible to comply with both simultaneously. Brief of *Amici Curiae* Association of Swine Veterinarians and National Pork

Although the petition includes some purported public policy concerns for atmospheric effect, the only legal argument it raises is a contention that certain provisions of §599f are expressly preempted by the FMIA, which prohibits states from imposing "[r]equirements within the scope of this chapter with respect to premises, facilities and operations of any [federally-inspected slaughterhouse] ... which are in addition to, or different than those made under this chapter." 21 U.S.C. §678. The Ninth Circuit's decision rejecting that argument is correct and fully consistent with the decisions of this Court and of every court of appeals that has interpreted the same statutory preemption language, and does not merit review.

A. Section 599f Is Not Expressly Preempted

Petitioner contends that "[t]he FMIA and its implementing regulations expressly and comprehensively govern slaughterhouse 'operations' concerning nonambulatory swine from the moment they arrive at or become nonambulatory on federally-inspected slaughterhouse 'premises,'" Pet.25, and that §599f is preempted because "once [swine are] on federally-regulated slaughterhouse grounds, federal law is to set the sole standards," Pet.35. Petitioner argues, in other words, that §599f is preempted because *any* law regulating conduct occurring on the "grounds" or "premises" of a slaughterhouse is necessarily preempted by §678.

That argument suffers from several fatal defects, including that most if not all of §599f's requirements

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Producers' Council at 2-4, 10-11. If that argument had any merit (it does not), the fact that the petition has waived it would be reason enough to deny certiorari in this case.

regulate activities clearly occurring outside the slaughterhouse premises. Petitioner seems to concede as much for §§(d), (f), (g) and much of (a), which prohibit actors *other than slaughterhouses* from buying, selling, receiving or transporting nonambulatory animals. The petition does not argue that those prohibitions are preempted, and they obviously are not—unless §678 somehow is read to preempt the entire field of state regulation of agricultural animals.

The dispute in this case thus centers around what the court of appeals called the "receipt and slaughter" provisions in §599f(a) and (b), and the humane euthanasia requirement in §(c). The first two sections do not regulate operations inside slaughterhouse premises at all, and certainly are not within the scope of what the FMIA itself regulates. As the Ninth Circuit recognized, §§(a) and (b) just remove a particular class of animals from the human food production chain entirely. Three circuits have now held that laws of that nature fall outside the FMIA's preemption provision. Section (c) does regulate inside the slaughterhouse premises, but it too is entirely outside the scope and purposes of the FMIA and therefore is not preempted.

1. Subsections (a) and (b) Are Not Preempted as to Pig Slaughterhouses Because States Can Ban Certain Animals from Ever Entering the Food Supply

Section 599f(a) provides in full: "No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal." Section 599f(b) provides: "No slaughterhouse shall process,

butcher, or sell meat or products of nonambulatory animals for human consumption."

As the Ninth Circuit correctly held, these provisions do not attempt to regulate the inspection and slaughter process inside the slaughterhouse; they "regulate[] the kind of animal that may be slaughtered." Pet.App.9a. Section (a) prevents nonambulatory animals from entering the premises at all, and §(b) limits what can be done with body parts derived from nonambulatory animals. As the Ninth Circuit explained, "[t]he 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." *Id.* "Federal law regulates the meat inspection process; states are free to decide which animals may be turned into meat." Pet.App.10a.

The Ninth Circuit's holding is consistent with the reasoning of both courts of appeals that have addressed similar laws banning the slaughter of certain animals for humane reasons. This Court declined to review both decisions.

In *Empacadora*, the Fifth Circuit held that state laws prohibiting slaughterhouses from processing horse meat were not preempted by §678 because "the FMIA does not expressly dispose states of the ability to define what meats may be available for slaughter and human consumption." 476 F.3d at 333. The court recognized that the preemption clause is "naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use" rather than limiting "states in their ability to regulate what types of meat may be sold for human consumption in the first place." *Id.* And in *Cavel*, the Seventh

Circuit similarly held that the "[FMIA] is concerned with inspecting premises at which meat is produced for human consumption, see, e.g., 21 U.S.C. §606, rather than with preserving the production of particular types of meat for people to eat." *Cavel*, 500 F.3d at 554 (citing *Empacadora*, 476 F.3d at 333). The court recognized that "in a literal sense a state law that shuts down any 'premises facilities and operations'" of a slaughterhouse "is 'different' from the federal requirements for such premises," but dismissed such a literal reading as "untenable" because it would preempt state laws that clearly fall outside the scope of the FMIA. *Id.* The court reasoned that while any horse meat that is produced must comply with the FMIA, if horse meat is not produced, "there is nothing, so far as horse meat is concerned, for the [FMIA] to work upon." *Id.*

Petitioner appears to concede that the statutes upheld in *Empacadora* and *Cavel* are not preempted, but argues that they are distinguishable because under those laws horses "are never allowed to enter federally-regulated slaughterhouse premises for slaughter, and such laws thus do not in any way alter the federal rules governing what is to occur *inside* those establishments." Pet.34; *see also id.* ("Such state laws . . . ban *all* horses from even entering the federal premises at all."). Petitioner mischaracterizes the laws upheld in *Empacadora* and *Cavel*. The Illinois law in *Cavel* made it unlawful "to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption." 225 Ill. Comp. Stat. §635/1.5(a). The Texas law in *Empacadora* made it unlawful to "sell[], offer[] for sale, or exhibit[] for sale horsemeat as food for human consumption," or

to "possess[] horsemeat with the intent to sell the horsemeat as food for human consumption." Tex. Agric. Code Ann. §149.002.

Those laws are not meaningfully different from §599f. If anything, §599f is *more clearly* a law preventing nonambulatory animals from "entering the federal premises at all," Pet.34, than the laws at issue in either *Empacadora* or *Cavel*. Unlike those laws, §599f(a) expressly prohibits slaughterhouses from "receiv[ing]" any nonambulatory animal in the first place. Section 599f(b) does also provide that no slaughterhouse shall "process, butcher, or sell meat or products of nonambulatory animals for human consumption," but that wording is not materially different than the Illinois law in *Cavel* and in context is just another way of removing nonambulatory animals from the human food production system altogether. Just as in *Empacadora* and *Cavel*, §599f(a) and (b) create a blanket prohibition on using an entire class of animals for human food. They do not regulate the treatment, handling, or inspection of animals who will be slaughtered for food, nor do they affect the operations or premises of the slaughterhouses, which can continue business as usual with respect to all other categories of animals.

There also is no support in either *Cavel* or *Empacadora* for petitioner's reductionist theory that once "inside" the premises of a slaughter facility state laws can have no force whatsoever. While it is undisputed that the FMIA does not regulate the handling, transport and sale of animals which occurs outside of slaughterhouses, it plainly does not follow from this that everything that occurs inside a federally inspected slaughterhouse is somehow immune from

state regulation. It cannot be, and is not, correct that every law regulating what happens inside federally inspected slaughterhouse grounds is preempted. A wide range of state laws—such as state building codes, workplace safety requirements, and general criminal laws—regulate operations inside slaughterhouses and, thus, would fall prey to petitioner's overbroad preemption analysis. Petitioner's argument would suggest that no state law could prevent a slaughterhouse from chaining workers to slaughter equipment for 100 hours a week, because such a law would regulate "operations" "inside" the facility.

A sensible interpretation of §678 must preserve some scope of operation for §678's express *savings* clause, and must incorporate both the "premises, facilities, and operations" language and the limitation that state law requirements are preempted only if they are "within the scope of" the FMIA, in light of the bedrock principle that the proper "understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 530 n.27 (1992) (opinion of Stevens, J.)). The FMIA's purpose is to protect consumers "by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. §602; *see also Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4-5 (1918) (stating that the FMIA seeks "to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce"). As the Fifth and Seventh Circuits have recognized, the FMIA's "scope" is a system of requirements for the

inspection of animals who are to be slaughtered and sold for food in interstate commerce. A state law thus is "within the scope of" the FMIA only if it imposes additional or different requirements relating to the inspection or slaughter of animals who will be used to produce meat and meat products.

To the extent §§(a) or (b) of §599f can be characterized as indirectly regulating activities inside a federally inspected slaughterhouse, none of the protections provided by those subsections is "within the scope" of the FMIA. As the Seventh Circuit squarely held in *Cavel*, a law like §599f(b) specifying which animals may be slaughtered for human consumption removes those animals entirely from the FMIA's purview. And petitioner identifies no provision of the FMIA which regulates in any way whether or how a slaughterhouse may "receive" a nonambulatory animal. Instead the petition only musters that "Section 599f(a)'s ban on the mere receipt of nonambulatory animals will require swine slaughterhouses to change their federally-sanctioned procedures for accepting swine." Pet.32. Yet the petition cites no provisions of the FMIA or record evidence establishing that there *are* any specific "federally-sanctioned procedures" governing receipt of pigs by slaughterhouses.[3] And the declarations submitted below concerning the usual operations at a single pig slaughterhouse do nothing to support the

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[3] In fact, federal inspectors are only at the slaughterhouses at specified times and may be entirely absent when animals arrive. *See* 9 C.F.R. §307.4 (schedule of operations for inspection); *see also id.* §311.27 (describing special procedures when an animal must be slaughtered "at night or on Sunday or a holiday when the inspector cannot be obtained").

narrow express preemption theory advanced by petitioner here.

The petition argues that a law making an entire species off limits from slaughter for meat production is different from a law that only takes *particular kinds of animals* out of the food production chain. But nothing in the FMIA suggests or supports a distinction between species-level laws like the ones at issue in *Empacadora* and *Cavel*, and finer-grained laws like §599f or, say, a requirement that only grass-fed cattle or free-range chickens may be slaughtered for food. *See* Pet.App.10a (suggesting other possibilities). Petitioner offers no coherent way to draw the lines its argument would require. The petition makes much of the Ninth Circuit's acknowledgment that "[i]t is possible that a state may go too far" and attempt to invade the FMIA's scope with detailed inspection requirements masquerading as restrictions on what kinds of animals may be slaughtered. The Ninth Circuit properly reserved those questions for another day, and recognized that *this* law is not inappropriately gerrymandered in that fashion. Section 599f "does not duplicate federal procedures" and "doesn't require *any* additional or different inspections than does the FMIA." Pet.App.11a.

2. Subsection (c) is Not Preempted as to Pig Slaughterhouses Because States Can Criminalize Cruelty to Animals Who Will Not Be Slaughtered for Interstate Commerce

Petitioner's arguments seem to be directed principally at §599f(c), which provides that "[n]o slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal." Subsection (c) has little if any practical significance, since other provisions of §599f prevent nonambulatory animals from arriving at the slaughterhouse at all and eliminate any financial incentive for slaughterhouses to process them into meat for human consumption. *Supra* at 12. Thus, this subsection can only operate where a slaughterhouse would otherwise go to the time and expense of processing a nonambulatory pig through federal inspection, despite lacking any lawful market for its sale.

In any event, §(c) governs only the handling of animals who will not enter the food supply, and humanely euthanizing such animals is entirely consistent with and outside the scope of the FMIA. The Ninth Circuit correctly held that §599f(c) merely requires slaughterhouses to take certain animals out of the food production chain entirely—and therefore is just like the state laws declaring that horses (or any other specific kind of animal) cannot be slaughtered for human consumption at all. This was part of the foundation for the Ninth Circuit's holding that "states are free to decide which animals may be turned into meat." Pet.App.10a.

The petition labors to convey the impression that §599f(c) somehow conflicts with federal provisions requiring ante-mortem inspections of nonambulatory animals. But the provisions petitioner cites refer to the ante-mortem inspection that animals must undergo if, and only if, they are presented for inspection in order to be slaughtered for human consumption. *See, e.g.*, 21 U.S.C. §603(a) (establishing "examination and inspection" of animals who "are to be slaughtered and the meat and meat food products thereof are to be used in commerce"); 9 C.F.R. §309.1 ("[A]nte-mortem inspection shall be made . . . before the livestock shall be allowed to enter into any department of the establishment *where they are to be slaughtered*" (emphasis added)).

FMIA regulations make ante-mortem inspection of livestock *to be slaughtered for meat* mandatory, but federal law does not mandate that any particular animal must be presented for inspection and subsequently slaughtered for meat. There is no affirmative federal requirement that a slaughterhouse must present an animal for inspection when it will not be slaughtered, and the only USDA guidance documents on the subject (addressing cattle) are expressly to the contrary. *See FSIS Directive 6100.1* at 5 (allowing establishment to "condemn and humanely destroy the non-ambulatory, disabled cattle" rather than present them for inspection); FSIS, *Questions and Answers FSIS Directive 6100.1* at 11 (Addendum to Defendant-Intervenors' Br. (9th Cir. Apr. 6, 2009)) ("[T]he establishment may elect to humanely euthanize livestock and dispose of the carcasses without presenting them for FSIS inspection.").

Accordingly, the Ninth Circuit recognized, the FMIA does not impose any requirements relating to whether particular classes of animals *must* be slaughtered for food. Pet.App.12a. That is why the court below rejected petitioner's implied preemption argument, which was based on the contention that it was impossible to comply with §599f and federal law simultaneously. *Id.* It is also why petitioner has abandoned that argument on certiorari. A law requiring that nonambulatory animals must be excluded from the human food supply, by euthanization at slaughterhouses, is no more "within the scope" of the FMIA than the part of §599f prohibiting the transport of such animals, or the part of §599f requiring that they must be euthanized by ranchers or veterinarians far from the slaughterhouse. Were it otherwise, as petitioner contends, both laws at issue in *Empacadora* and *Cavel* would have been struck down. *Supra* at 19-22.

3. FSIS Has Not Rejected Regulatory Proposals Similar to §599f

The petition's suggestion (Pet.14) that FSIS has rejected regulatory proposals similar to §599f is irrelevant and wrong. "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated," *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983), but a decision not to regulate is evidence of federal intent to preempt state regulations only if the relevant federal entity "convey[s] an 'authoritative' message" that there is a federal policy against such regulations. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002). That would be an implied preemption argument, but the petition

abandons any such arguments and does not even attempt to make the necessary showing that FSIS has conveyed any such message. Nothing in the FSIS review cited by petitioner conveys an "authoritative" determination inconsistent with §599f. *See* Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11,463, 11,463 (Mar. 18, 2009). To the contrary and consistent with §599f, the FSIS regulation bans the slaughter for human consumption of nonambulatory cattle. 9 C.F.R. §309.3(e) ("Non-ambulatory disabled cattle that are offered for slaughter must be condemned and disposed of in accordance with §309.13."). Although FSIS decided not to require the immediate euthanization of nonambulatory swine, its decision in no way addressed the substantive reasons for such a decision—merely stating that it was "[an] issue . . . outside the scope of this rulemaking." 74 Fed. Reg. at 11,464.

B. The Ninth Circuit's Decision Is Consistent With This Court's Decision in *Jones v. Rath Packing Co.*

Petitioner attempts to claim a conflict with this Court's decision in *Rath Packing*, and argues that *Rath Packing* mandates a "broad reading" of the FMIA's preemption provisions. But that decision is fully consistent with the Ninth Circuit's conclusion that §599f is not preempted by the FMIA.[4]

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[4] Petitioner also cites *Armour & Co. v. Ball*, 468 F.2d 76, 84-85 (6th Cir. 1972), *cert. denied*, 411 U.S. 981 (1973), for this proposition. Armour also deals with state labeling requirements for meat that were preempted by express preemption provision of the FMIA regarding labeling, and is distinguishable on the same grounds as *Rath*.

The *Rath Packing* Court applied established preemption principles to determine that the state law in that case was preempted by *different* preemption language in the FMIA that is not at issue here. In addition to the preemption clause addressed by the petition, the FMIA separately prohibits states from enforcing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter." 21 U.S.C. §678. *Rath Packing* applied *that* preemption clause to state laws requiring that certain information must be placed on bacon packaging. 430 U.S. at 532. This Court held, unsurprisingly, that "[i]t twists the language beyond the breaking point to say that a law mandating that labeling contain certain information is not a 'labeling requirement.'" *Id.* Nothing in *Rath Packing* discusses the preemption language at issue here, or suggests that courts must read all provisions of the FMIA "broadly," and certainly not beyond their actual textual scope. This Court just cautioned against ascribing an absurdly "restrictive meaning ... to the phrase 'labeling requirements.'" *Id.* The state law at issue in that case also conflicted with a federal requirement directly on point. *Id.* at 531-32 ("[T]he state law's requirement—that the label accurately state the net weight, with implicit allowance only for reasonable manufacturing variations—is 'different than' the federal requirement, which permits manufacturing deviations *and* variations caused by moisture loss during good distribution practice."). *Rath Packing*'s holding is limited to the specific and highly factbound issues presented there, which can have no impact on this case.

Petitioner also wrongly suggests that *Rath Packing* did not apply any "presumption against preemption."

Pet.21-23. Petitioner is playing a murky game of semantics at best. This Court began its preemption analysis in *Rath Packing* with the traditional rule that

> [w]here, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

430 U.S. at 525 (internal citations and quotation marks omitted). This Court then held that Congress's preemptive purpose was "clear and manifest" with respect to the state *labeling* requirements at issue in that case. In this case, the Ninth Circuit correctly determined that Congress had not evinced any such "clear and manifest purpose" requiring preemption of the relevant provisions of §599f. That decision in no way conflicts with the holding in *Rath Packing*.

II. REVIEW IS NOT WARRANTED TO ADDRESS ABSTRACT ISSUES CONCERNING WHEN OR HOW THE PRESUMPTION AGAINST PREEMPTION APPLIES

Petitioner argues that certiorari should be granted to resolve supposed confusion over the proper application of the presumption against preemption to statutes containing express preemption provisions, such as the FMIA. The petition greatly overstates the extent of any such confusion, and regardless this case would not be an appropriate vehicle to attempt any grand transformation or reconciliation of the preemption case law.

A. This Case Is Not An Appropriate Vehicle To Reconsider The Presumption Against Preemption

The petition argues that the traditional presumption against preemption should play no role in the interpretation of express preemption clauses, and that there is some confusion in this Court's case law and in the lower courts on that issue. Even if those arguments had any merit (which they do not), this would not be an appropriate case to review them for two reasons.

First, these arguments were neither pressed nor passed upon below. Even though California's opening brief on appeal clearly argued that "[t]here is a strong presumption against federal preemption," petitioner's responsive brief did not challenge that contention or advance the argument for which it now seeks review. State Appellants' Opening Br. at 18 (9th Cir. Apr. 3, 2009). The Ninth Circuit's opinion dutifully recites the presumption against preemption without recognizing any dispute between the parties (or in the case law) about its application, and without any substantive analysis of whether that presumption should apply differently in express preemption cases. Pet.App.7a. This Court "[o]rdinarily ... does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (refusing to consider arguments not pressed by petitioner below).

Second, the Ninth Circuit did not consider the statutory interpretation question at the heart of this case to be a close one. It described petitioner's arguments as "[h]ogwash," and noted that those

arguments are inconsistent with the decisions of every circuit that has interpreted the FMIA preemption provision at issue here. Pet.App.9a-10a. Although the Ninth Circuit recited the traditional presumption against preemption, that presumption did no real work in its analysis—which was entirely based on the clear import of the language and purposes of the FMIA. Pet.App.9a-11a. That court's ultimate resolution of the express preemption issue came down to the following:

> 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.

Pet.App.11a. Because the Ninth Circuit's determination that §599f was not preempted would have been the same regardless of whether or not the court applied a presumption against preemption, this case would not be a promising vehicle for this Court to explore or clarify the proper scope and application of the presumption.

B. The Petition Greatly Overstates Any Confusion In Existing Preemption Case Law

In any event, the petition is wrong to suggest that this Court's recent cases have been inconsistent or that there is any meaningful confusion in the lower courts concerning these issues.

Petitioner relies heavily on Justice Thomas's dissent in *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008), which noted that the force of the presumption

has "waned" in recent express preemption cases, some of which have been decided without reference to the presumption. *Id.* at 556 (Thomas, J., dissenting). But this Court has never held that the presumption has no role to play in express preemption cases; it has, recently and repeatedly, held the opposite. In *Altria* itself this Court invoked the presumption against preemption in interpreting an express preemption provision, explaining that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Id.* at 543 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); *see also Medtronic, Inc.*, 518 U.S. at 485-86. While the text of a statute obviously controls any express preemption inquiry, the presumption against preemption still applies when the text is inconclusive.

Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710 (2009), is not to the contrary. In that case, this Court held that the express preemption provision of the National Banking Act limited only the states' supervisory powers over corporations and did not preempt a state attorney general's ability to enforce state law. Contrary to petitioner's assertion, this Court did not state that the presumption against preemption did not apply; rather, the majority found the plain terms of the statute so clear that it was unnecessary to rely on the presumption in finding that the challenged state action was not preempted. *Id.* at 2720 ("We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act."). This Court refrained from applying the presumption because, like here, the text of the express preemption

clause was not "susceptible of more than one plausible reading." *Altria Group, Inc.*, 129 S. Ct. at 543.

There also is no conflict or confusion in the courts of appeals. Petitioner juxtaposes a laundry list of circuit cases holding that a presumption against preemption applies in the context of express preemption clauses with other cases that purportedly "limit its reach" by recognizing that the presumption can be overcome by clear statutory language. Pet.29-30. That is no conflict; it reflects the proper application of the principle explained in *Altria* that the presumption only comes into play where an express preemption clause is "susceptible of more than one plausible reading." Although petitioner suggests that the presumption sometimes is "wholly ignored" in express preemption cases, the only case it cites, *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010), itself a Ninth Circuit case, does not clearly reject a role for the presumption in express preemption cases. In *Chae*, the Ninth Circuit merely analyzed the nature of the plaintiffs' state law claims and determined that the text of various federal express preemption provisions preempted some of those claims. *Id.* at 942-43.[5]

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[5] There is no reason to hold this case pending resolution of the two express preemption cases currently on this Court's docket. No party has argued in either case that the presumption against preemption should not apply in express preemption cases. *See Bruesewitz v. Wyeth*, No. 09-152 (argued Oct. 12, 2010), and *Chamber of Commerce v. Whiting*, No. 09-115 (argued Dec. 8, 2010).

III. THE PETITION'S PUBLIC POLICY ARGUMENTS ARE UNPERSUASIVE AND NOT APPROPRIATELY PRESERVED OR PRESENTED FOR REVIEW

Unable to claim a circuit split or even credible confusion as to any broadly applicable legal principles, the petition tries to suggest that the Ninth Circuit's decision somehow implicates issues of great national importance. These arguments are unpersuasive and not appropriately preserved or presented for review.

The petition suggests that review is necessary to preserve the "uniformity" of the federal slaughterhouse inspection regime. But petitioner's uniformity claim is a fiction; slaughterhouses are already subject to differing state regulations as to many aspects of their operations unrelated to the inspection process, including worker safety, environmental protection, and zoning. The fact that a handful of slaughterhouses in California may have to euthanize a few more nonambulatory pigs than they already do will not disrupt any important national policies. This case does not, for example, implicate the common concern in preemption cases that state regulation of a nationally distributed manufactured good will disrupt the market or end up setting a *de facto* national standard. Section 599f also has required for nearly two decades that slaughterhouses either euthanize nonambulatory animals or remove them from the premises. *See* 1994 Cal. Legis. Serv. ch. 600 at 2961; *supra* at 1-2. The recent amendments eliminate the removal option, but for purposes of petitioner's preemption arguments that change is inconsequential. The statutory regime in California has, therefore, been

inconsistent with petitioner's arguments for sixteen years without producing any disruption of the federal scheme.

As discussed above, petitioner also makes no argument challenging the provisions of §599f that apply outside the slaughterhouse and to non-slaughterhouse actors. Section 599f contains many different prohibitions, some new and some old, each of which regulates different conduct, and each of which clearly avoids the FMIA's preemptive scope. Most of its provisions would stand even under petitioner's preemption theory—unless petitioner wishes to adopt a theory of preemption far more sweeping than the petition admits. Those provisions prevent anyone from transporting a nonambulatory animal or selling it to a slaughterhouse, and prevent slaughterhouses from receiving such animals in the first place. *See* Cal. Penal Code §599f(a), (d), (f), (g). Even if petitioner were correct that federal law displaces all state regulation of what goes on "*inside*" a slaughterhouse, *e.g.*, Pet.34-35, its arguments therefore would be significant only as applied to the extremely small and wholly unquantified subset of animals who can walk into the slaughterhouse but become nonambulatory in the interval between receipt and slaughter. And even as to those animals, §599f(b)'s prohibition against the later *sale* of meat and meat products derived from nonambulatory animals means that slaughterhouses will have no incentive to process such animals through federal inspection in any event. So it is not clear that the limited preemption claims advanced in the petition would have any practical significance for slaughterhouse operations at all.

In any event, compliance with §599f also will not disrupt the federal inspection process in any way. Slaughterhouses nationwide do not come into conflict with the federal inspection regime when they voluntarily elect to euthanize nonambulatory animals rather than present them for inspection, as is their right. Compliance with §599f will be no more disruptive. If anything, a rule automatically removing nonambulatory animals from the federal inspection process will remove a burden on federal inspectors and thereby make that process run more smoothly.

The petition's principal argument that this case raises issues of national importance rests on the suggestion, woven throughout, that by removing nonambulatory animals from the federal ante-mortem inspection process §599f will make it harder for federal officials to detect and track communicable diseases. These arguments are not appropriately preserved or presented. Petitioner's briefing below alludes to these concerns in a few short and conclusory passages, *e.g.*, Appellee's Br. at 41 n.8, 44-45 (9th Cir. May 1, 2009), but the Ninth Circuit obviously did not believe that petitioner was pressing a serious argument along these lines and stated that "[n]othing in the record substantiates this concern." Pet.App.15a n.7. Indeed, petitioner has completely changed its tune to sing its song to this Court. In the district court, its primary policy argument below was that §599f interferes with the supply of meat for no good reason because meat from pigs poses no real communicable disease dangers. *Supra* at 13-14. Now, petitioner's primary policy argument is that §599f interferes with the detection of diseases in those same pigs—an argument it did not clearly advance in support of its motion for a

preliminary injunction and that finds no support in the record.

Further, petitioner failed to submit *any* evidence to the courts below—much less develop an adequate factual record—regarding the alleged importance of ante-mortem inspections of animals who will not be processed for meat. *See Lawn v. United States*, 355 U.S. 339, 354 (1958) ("[W]e must look only to the certified record in deciding questions presented."). Petitioner claims that systematic ante-mortem inspection of nonambulatory animals is "the primary process by which serious communicable diseases are first detected," Pet.4, and that the elimination of ante-mortem inspection "greatly increase[s] the risk that serious communicable diseases will not be timely detected or addressed." Pet.13. But the petition does not provide a single citation to the record or the decisions below for these assertions. As the Ninth Circuit recognized, there is no evidence in the record indicating that ante-mortem, rather than post-mortem, inspection is necessary for detecting or diagnosing any diseases in swine or other livestock. Pet.App.15a n.7. Respondents dispute these assertions, and if such evidence had been presented respondents would have been entitled to contest it and would have done so vigorously.

Petitioner certainly bore the burden of developing the record necessary to support its arguments that it is likely to succeed on the merits for preliminary injunction purposes. This Court should not accept review at this time, in an interlocutory posture, to consider untested factual assertions that lack any support in the record—particularly when petitioner has strategically chosen not to pursue the conflict

preemption arguments to which these factual claims would be most relevant. If these public health claims have any merit at all, they should be evaluated in a case where both sides have had the opportunity to develop the necessary facts in the courts below and where the petitioner has not waived the relevant legal arguments.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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