In The

Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

The questions presented in this case are:

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

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

QUESTIONS PRESENTED – Continued

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

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

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

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

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

STATUTORY AND REGULATORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

A. The Federal Meat Inspection Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. California's Regulation of Federally-Inspected Slaughterhouses

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

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

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

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

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

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

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

D. Proceedings Below

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

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

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

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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[13] *Rath Packing* directly involved Section 678's parallel, identically-worded preemption language providing that: "Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State. . . ." 21 U.S.C. § 678. In rendering its decision, the Court took the full preemption clause, including the language at issue here, into account. *Rath Packing,* 430 U.S. at 530 n.17.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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