No. 10-224

In The
Supreme Court of the United States

NATIONAL MEAT ASSOCIATION,
Petitioner,

v.

KAMALA D. HARRIS, ET AL.,
Respondents.

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

BRIEF OF PROFESSORS OF PREEMPTION LAW AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are professors of constitutional law, administrative law, and federal preemption. They are familiar with the issues in this case and knowledgeable about the federal preemption issues involved. [1]

Professor William Funk is the author of *American Constitutional Structure* and a co-author of one of the leading administrative law casebooks, *Administrative Procedure and Practice: Problems and Cases*. He has published numerous articles on administrative and constitutional issues, in publications including the Duke Law Journal, the Harvard Journal on Legislation, the Yale Journal on Regulation, the Administrative Law Review and the U.C.L.A Journal of Environmental Law and Policy.

Professor Thomas McGarity is a leading scholar in the fields of both administrative law and preemption, and holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas at Austin School of Law. He has written five influential books: *The Preemption War: When Federal Bureaucracies Trump Local Juries*,

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief; correspondence reflecting this consent has been filed with the Clerk of the Court.

Bending Science: How Special Interests Corrupt Public Health Research, *Workers at Risk* (co-author), *The Law of Environmental Protection* (co-author), and *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy*.

Professor Sandra Zellmer is the Alumni Professor of Natural Resources Law at the University of Nebraska College of Law. She is also a co-director of the University's *Water Resources Research Initiative*, an interdisciplinary educational and research effort. Her scholarly writings cover a range of topics, including preemption, water and public lands management, and wildlife and adaptive management, and have been published in journals including the Florida Law Review, Nebraska Law Review, and Houston Law Review, notably, *Preemption by Stealth*, 45 HOUSTON L. REV. 1569 (2009).

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress clearly acts to displace state law in matters of national concern, the courts should unquestionably give the federal action full effect. But, particularly in areas of traditional state regulation, the courts should not displace state law lightly. The Constitution models (and requires) this balance, giving substantial power to the federal government to act in certain contexts, while preserving the role of the States wherever possible, to establish our vibrant system of federalism.

One of the tools the Court has used to respect these constitutional boundaries is a "presumption against preemption." While some members of the Court have criticized a strong variant of the pre-

sumption against preemption, the entire Court has agreed on the "threshold description of the law of preemption . . . that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., concurring in judgment in part and dissenting in part) (internal quotation marks and citations omitted). By approaching preemption questions with this assumption, the Court thereby gives effect to the text of the Supremacy Clause and the Constitution's federalist structure.

Following these principles, the Ninth Circuit properly determined that California Penal Code § 599f was not preempted by the Federal Meat Inspection Act (FMIA). In 2008, just months after a national scandal over issues associated with the slaughter of non-ambulatory livestock, the California Legislature enacted Assembly Bill 2098, a comprehensive prohibition on the sale, purchase, receipt, processing or butchering of livestock that are unable to walk without assistance. For ethical reasons, California's elected representatives concluded that "downed" animals should be excluded from becoming any part of the food production chain.

California's policy decision to exclude non-ambulatory animals from the meat production process is not preempted by the Federal Meat Inspection Act. As its name expressly suggests, the FMIA's primary concern is the meat inspection process and ensuring the quality of meat produced for human consumption and "used in commerce." 21 U.S.C. § 603(a). With respect to preemption, the relevant text of the FMIA contemplates three categories of state

law: state regulations regarding the "premises, facilities, and operations" of federally inspected slaughterhouses, which are expressly preempted, 21 U.S.C. § 678; state regulation regarding "any other matters regulated under this chapter," which are expressly saved from preemption, *id.*; and, of course, state laws outside the scope of the FMIA's statutory ambit, which are not displaced. Which animals a State chooses for ethical reasons to exclude from being slaughtered and processed into meat falls outside the federal government's interest in inspecting the animals that *will* be sold as meat for human consumption. And federal law does not require state law determinations as to what animals are suitable for slaughter to be left at the slaughterhouse gates.

In the FMIA, Congress expressed its intent to preempt state law under certain circumstances, while also explicitly preserving state authority in other circumstances, pursuant to a savings clause. The harmonious interaction between the FMIA and California's anti-cruelty statute reflects the proper federalist balance contemplated by the Constitution. The FMIA serves a national interest in ensuring that meat sold to American consumers is safe, and that animals that "are to be slaughtered" are treated in a manner consistent with that goal. 21 U.S.C. § 603. The representatives of the people of California enacted California Penal Code § 599f to declare that certain animals are *not* to be slaughtered in their State—namely, animals that are too sick, weak, or crippled to stand and walk on their own. Federal law leaves room for California to determine "that efforts to slaughter downed animals necessarily involve morally unacceptable risks of egregious inhumane treatment." Br. of Non-State Resp. at 15. *See gener-*

ally Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (noting that "[t]he first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes ").

ARGUMENT

I. The Plain Language of the FMIA Demonstrates that California's Animal Welfare Law Falls Outside the Scope of the Act's Express Preemption Provision.

The Supremacy Clause of the U.S. Constitution provides that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, para. 2. The Court has applied the Supremacy Clause to preempt state laws that conflict with federal law. *E.g.*, *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984) (explaining that federal preemption occurs "by direct operation of the Supremacy Clause"). This conflict can arise when Congress has expressly preempted state law by including such a statutory provision. However, even "[i]f a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008).

This Court has explained that "[w]hen a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) ("Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it.") (quoting *Gade v. Nat'l Solid Wastes Mgmt. Assn.,* 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)). Similarly, a federal statute's savings clause should be applied on its terms, and not read narrowly without a textual basis. *Whiting*, 131 S. Ct. at 1980 ("Absent any textual basis, we are not inclined to limit so markedly the otherwise broad phrasing of the savings clause.").

A. The Scope of the FMIA Covers Only Animals Bound for Slaughter, Leaving States Free to Exclude Non-Ambulatory Animals from the Slaughtering Process.

Federal law expressly contemplates an active state role in regulating the meat industry, even as it more jealously guards the federal inspection process of animals bound for slaughter. California's prohibition on the slaughter of non-ambulatory animals is consistent, even supportive, of the balance struck by federal law, since it deals with which animals may be slaughtered and sold as meat, as opposed to how animals bound for slaughter should be inspected. Indeed, interpreting the FMIA to require displacement of California's determination that non-

ambulatory animals are excluded for ethical reasons from the slaughtering process would upset the federal-state balance contemplated by the FMIA, turning preemption principles on their head.

NMA's challenge to Section 599f is based on the FMIA's express preemption provision, which states:

> 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.

But at the same time this provision expressly preempts any efforts by the States to alter the federal inspection process of animals bound for slaughter, it also explicitly provides that "[t]his chapter shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." *Id.* This savings clause makes clear that Congress contemplated that the States will continue to play some role, even in terms of "matters regulated under this chapter." *Id.* *See generally* Sandra B. Zellmer, *Preemption by Stealth*, 45 HOUSTON L. REV. 1659, 1661 (2009) ("Both savings clauses and preemption clauses serve to demarcate the boundaries of federal and state law, but unlike preemption clauses, savings clauses strike the bal-

ance in favor of states and state law remedies."). There is certainly nothing in the FMIA's text and structure to suggest displacement of the States' role in ethical and moral matters *not* regulated by the Act.

A fair reading of these provisions demonstrates that California's law excluding certain animals from slaughter does not expressly conflict with federal law governing the inspection of animals that are bound for slaughter. Preserving the domain of the States to determine which animals may be slaughtered is fully consistent with the federal-state balance struck by the FMIA.

The FMIA could not be more clear that its target is animals bound for slaughter and that its purpose is to ensure the quality of meat produced for human consumption—it simply does not govern animals not bound for slaughter that are not intended to be processed into meat. To begin, the title of the chapter in the U.S. Code governing these questions is "Meat Inspection," 21 U.S.C.A. Ch. 12, not "Animal Inspection." The very first words of the congressional statement of findings are "[m]eat and meat food products," and the clear motivating purpose of the law is to protect "the health and welfare of consumers . . . by assuring that *meat and meat food products* distributed to them are wholesome, not adulterated." 21 U.S.C. § 602 (emphasis added). The title of the subsection covering inspection is "Examination of animals *before slaughtering*; diseased animals *slaughtered* separately." 21 U.S.C. § 603(a) (emphasis added). It requires "an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-

canning, rendering, or similar establishment, *in which they are to be slaughtered* and the *meat and meat food products* thereof are to be used in commerce." *Id.* (emphasis added). It also makes clear that the inspection requirements are "[f]or the purpose of preventing the use in commerce of *meat and meat food products* which are adulterated." *Id.* (emphasis added). In short, the scope of the FMIA covers animals bound for slaughter that are intended to be processed into meat for human consumption. The FMIA does not restrict or preempt California's decision to exclude non-ambulatory animals from slaughter altogether (requiring that they, instead, be humanely euthanized and not processed into meat).

NMA's arguments to the contrary are a bridge too far, demonstrating that its disagreement with California law is rooted in policy disagreement rather than any legitimate concern over federal supremacy. NMA argues that once an animal passes through the slaughterhouse gates, what happens to that animal is solely determined by federal law, state law notwithstanding. Pet. Br. at 45-46. So although California can exclude a non-ambulatory animal from entering a federally-inspected slaughterhouse, under NMA's view, once that animal crosses the threshold, it matters not whether California law prohibits the slaughter of non-ambulatory animals, since "[n]either the Act, nor [Food Safety and Inspection Services] regulations or directives, prohibits the receipt of nonambulatory swine." Pet. Br. at 46.

But what if a horse were somehow mistakenly included in a vehicle carrying swine? Although California law prohibits the slaughter of horses, Cal.

Penal Code § 598c, nothing in federal law prohibits either the receipt or slaughter of horses. It is unclear how NMA's reasoning should lead to a different result for a horse than it would for a non-ambulatory animal. Under NMA's view, both the errant horse and the non-ambulatory pig should be inspected and slaughtered absent a federal rule to the contrary, no matter what state law says. But this reasoning is fundamentally flawed. Federal law does not require state law determinations of what animals may be slaughtered to be left at the slaughterhouse gates. There are no federal requirements that *any* animal be slaughtered; federal law only governs *how* animals bound for slaughter must be treated and inspected. California's moral choice to exclude from slaughter animals too weak or sick to walk to their own death should be given the same respect as California's moral decision to exclude horses from slaughter.

NMA's arguments relating to the inspection of non-ambulatory animals also reach too far. Petitioner's attack on California's prohibition against "hold[ing] a nonambulatory animal without taking immediate action to humanely euthanize the animal," Cal. Penal Code § 599f(c), as being fundamentally incompatible with the FMIA's antemortem inspection requirements for non-ambulatory animals misunderstands the nature of these requirements. First, these inspection requirements are primarily in place to filter out non-ambulatory animals whose meat should not enter into the food supply, a goal not hindered by California's requirement for immediate, humane euthanization of non-ambulatory animals.

Second, while the federal inspection requirements certainly have some value added in helping to identify communicable disease, even the federal agency responsible for inspections, the Food Safety and Inspection Services (FSIS), acknowledges that immediate, humane euthanization does not necessarily conflict with these subsidiary purposes. FSIS's "Slaughter Inspection 101" "Fact Sheet" clarifies that "[i]f an animal goes down or shows signs of illness . . . the establishment must immediately notify the FSIS veterinarian to make a case-by-case disposition of the animal's condition. *Alternatively*, the establishment *may humanely euthanize* the animal." 9 C.F.R. § 309.1 (emphasis added). These instructions are consistent with federal regulations, which only *require* inspection of "livestock offered for slaughter." 9 C.F.R. § 309.1(a). By the plain text of the statute, federal law simply does not require inspection of animals *not* bound for slaughter.

The language Congress used in the FMIA's preemption provision—preempting state laws with respect to premises, facilities, and operations—"require[s] a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute." *Medtronic*, 518 U.S. at 500. Had Congress wanted to preempt the vast swathe of state law that NMA suggests—basically anything connected to slaughterhouses—it could have done so. As it is, the broad reading NMA seeks to give to the FMIA's preemption clause would essentially render the Act's savings clause a nullity. This would make no sense. *See Whiting*, 131 S. Ct. at 1981 ("Given that Congress

specifically preserved such authority for the States, it stand to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.") If anything, the specificity of the FMIA's express preemption clause—limiting it to regulations with respect to the "premises, facilities and operations" of federally inspected slaughterhouses—and the broadness of the savings clause—expressly preserving state authority to regulate "other matters" covered by the Act, as well, as, obviously, all matters *not* covered by the Act—counsels restraint in interpreting the text of the preemption clause. No strict "presumption against preemption" is necessary to reach this statutory construction. It is simply the only common-sense reading of the plain language of the federal law.

B. The Court Should Not Use General Policy Concerns Not Expressed in the Text and Structure of the FMIA to Preempt California Penal Code Section 599f.

The vague policy concerns and anxieties expressed by the NMA and the United States as *amicus curiae* are not only baseless, *see* Br. for Non-State Resp. at 52-59, but also threaten to untether the Court's preemption analysis from its foundations.

First, implied preemption arguments based on nothing more than federal "balancing" of conflicting policies are particularly unpersuasive in contexts that do not "involve uniquely federal areas of regulation." *Whiting*, 131 S. Ct. at 1983. Animal welfare and humane handling laws have traditionally been matters of state concern. *See United States v. Ste-*

vens, 130 S. Ct. 1577, 1583 (2010). The primary goal of Section 599f was to prevent cruelty to non-ambulatory animals. 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. Congress enacted the FMIA to "prevent[] the use in commerce of meat and meat food products which are adulterated." 21 U.S.C. § 603(a). This purpose is not offended by a state law such as § 599f, which removes a class of animals from food production entirely. To read the law to preclude § 599f would reach far beyond the plain language of the FMIA in order to preempt far more than Congress intended.

Second, it is inappropriate to read into legislation a desire for uniformity when the text and structure of the Act reflect the desire to allow some degree of policy diversity among the States. The broadly worded savings clause of the FMIA reflects Congress's comfort with some degree of heterogeneity in state regulations regarding "other matters" covered by the Act. Where Congress has "expressly preserved the ability of the States to impose their own sanctions . . . that—like our federal system in general—necessarily entails the prospect of some departure from homogeneity." *Whiting*, 131 S. Ct. at 1979-80. *See also* Zellmer, 45 HOUSTON L. REV. at 1662-63 (arguing that savings clauses enhance the "congressional objective of cooperative federalism").

Finally, vague policy arguments in support of preemption are of little use when state actions do not

"directly interfere[] with the operation of the federal program." *Whiting*, 131 S. Ct. at 1983. In the FMIA, "[a]s with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests . . . . [p]art of that balance, however, involved allocating authority between the Federal Government and the States." *Id.* at 1984. The policy arguments advanced by NMA and the United States ask the Court to venture into the sort of "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" that this Court has explained "would undercut the principle that it is Congress rather than the courts that preempts state law." *Gade,* 505 U.S. at 111 (1992) (Kennedy, J., concurring in part and concurring in judgment).

A doctrine that substitutes "policies" for "laws" in Article VI's Supremacy Clause—and thereby authorizes judicial displacement of State laws on that basis—is inconsistent with basic principles of deliberation and democratic accountability expressed in Article I and Article III. Although courts have established means of discerning the meaning of laws, there is no similarly reliable method of determining the "policies" of a statute. *See Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J. concurring in judgment) ("It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions. And likewise dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor"); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326 (2008) ("It is not our job to speculate upon congressional motives."). Because many federal

statutes can be said to embody "countless policies," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990), it would be particularly inappropriate to allow a judicial search for ambiguous congressional purposes to trump the longstanding laws of the sovereign States. *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (declining "'to give the state-displacing weight of federal law to mere congressional *ambiguity*'") (quoting Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, 480 (2d ed. 1988)); Kenneth Starr, et al., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE, 36 (ABA 1991) (criticizing the "purpose inquiry" in preemption cases because "a complex of competing legislative policies can be undermined").

In *Bates v. Dow Agrosciences*, Justice Thomas (joined by Justice Scalia) approvingly noted the "Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption," 544 U.S. 431, 459 (2005) (Thomas, J., concurring in the judgment in part and dissenting in part), explaining that preemption analysis should be limited to "inquiry into whether the ordinary meanings of state and federal law conflict.'" *Id.* (quoting *Gade*, 505 U.S. at 110 (Kennedy, J. concurring)). Stretching the terms of the FMIA's preemption provision to the extent required by NMA's argument threatens state sovereignty and our federalist system. *See Medtronic*, 518 U.S. at 488 (rejecting "sweeping interpretation" of preemption clause in part because it would "produc[e] a serious intrusion into state sovereignty").

II. The FMIA Preserves Important State Regulatory Authority, Reflecting the Constitution's Careful Balancing of Federal-State Power.

Particularly in areas of traditional state regulation, the courts should not displace state law lightly. The Constitution contains a carefully crafted balance of federal-state power, giving substantial power to the federal government to act in certain contexts while preserving the role of the States wherever possible, to establish our vibrant system of federalism. As this Court has long recognized, the enumeration of powers in Article I, reinforced by the Tenth Amendment, make clear the intent to preserve the authority of States, thereby "assur[ing] a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; increas[ing] opportunity for citizen involvement in democratic processes; [and] allow[ing] for more innovation and experimentation in government." *Gregory*, 501 U.S. at 458. *See generally* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 538-39 (1995) (arguing that "federalism needs to be reconceptualized as being primarily about *empowering* varying levels of government and much less about limiting government," and advocating that preemption doctrine be applied "so as to maximize the ability of state and local governments to act").

The Supremacy Clause is a key part of the Constitution's careful balance of federal-state authority. Far from authorizing preemption of state law in the name of every federal policy or purpose, Article VI allows displacement of state law only by enacted federal *law*, which requires express agreement among

two houses and two democratically-elected branches of government. *See* U.S. CONST. art. I, § 7; *INS v. Chadha*, 462 U.S. 919, 951 (1983) (finding that courts may not give effect to law that did not follow the "single, finely wrought and exhaustively considered, procedures" specified in the Constitution); *see also Thompson*, 484 U.S. at 191 (Scalia, J., concurring in the judgment) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed."); *Bowsher v. Synar*, 478 U.S. 714, 757-759 (1986) (Stevens, J., concurring in the judgment) ("when Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I").

The constitutionally-mandated lawmaking process not only ensures that important decisions are made deliberately and democratically, but it also contains special federalism safeguards. In particular, the provision of equal State representation in the Senate in Article I, § 3, represents "a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty." THE FEDERALIST No. 62, 408 (James Madison) (B. Wright ed., 1961); *accord* THE FEDERALIST, *supra,* No. 43, 315 (James Madison); *see also Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 551 (1985) ("The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent."). To permit displacement of state law by judicially imputed policies is to deny the States their main

"protect[ion] from [federal] overreaching" and circumvent "the principal means chosen by the framers to ensure the role of the States in the federal system." *Garcia*, 469 U.S. at 550-51 & n.11 (citing, *inter alia*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)); *see also id.* at 556 ("the built-in restraints that our system provides through state participation in federal governmental action . . . . ensure[] that laws that unduly burden the States will not be promulgated."); *see generally* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328-36 (2001).

Accordingly, regardless of whether a specific "presumption against preemption" is applied to an express preemption provision or not, the courts must be careful to ensure that state law is only preempted by federal "law," U.S. Const. art. VI—that is, only when it is clear that Congress has displaced state law through its constitutional lawmaking power. *See generally* William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TULANE L. REV. 1233, 1254 (2010) (explaining that the "presumption against preemption" is justified by "respect for the concepts of federalism and the fact that only if Congress does exercise its constitutional powers can it preempt state law").

Some members of the Court have criticized the "presumption against preemption," and argue against its application in express preemption cases, in particular. *E.g.*, *Bates*, 544 U.S. at 457 (Thomas, J., concurring in judgment in part and dissenting in

part); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 544-45 (1992) (Scalia, J., concurring in judgment in part and dissenting in part). This criticism is echoed by Petitioner and its *amici*. *E.g.*, Pet. Br. at 52; Br. of Chamber of Commerce as *Amicus Curiae*. But the entire Court has agreed on the "threshold description of the law of pre-emption . . . that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in judgment in part and dissenting in part) (internal quotation marks and citations omitted). *Cf. Wyeth v. Levine*, 555 U.S. 555 (2009) ("In all pre-emption cases and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . 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.'") (citations omitted). To the extent the Ninth Circuit in this case applied any sort of presumption, it was simply to read the FMIA against this backdrop of traditional state authority. The circuit court's reading of the statute's express preemption and savings provisions and California's anti-cruelty law did not involve the sort of "distort[ion] [of] federal law to accommodate conflicting state law," *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2580 (2011) (plurality op.), that the presumption's critics decry.

Starting from the assumption that the States retain their traditional regulatory power is a pragmatic way to respect the constitutional boundaries set out in our federalist structure and the Supremacy

Clause's textual requirement that only federal "law" shall displace state regulation. *See* Funk, 84 TULANE L. REV. at 1254 (observing that the presumption against preemption serves a practical purpose in helping to interpret preemption provisions and serves to protect federalism). Here, the FMIA's express preemption provision rebuts any "presumption against preemption" with respect to whether Congress intended to preempt at least *some* state law; however, with respect to the *scope* of the preemption provision, Congress must still be clear if it wants to displace traditional state authority. *See Medtronic*, 518 U.S. at 484-85. This is especially true in the case of a statute, such as the FMIA, in which Congress has expressed its intent to preempt state law under certain circumstances while also explicitly preserving state authority in other circumstances, pursuant to a savings clause.

In this case, the FMIA and California Penal Code § 599f are not in conflict, as discussed in detail in Section I. To the contrary, the State's anti-cruelty statute reflects the Constitution's federalist balance. The FMIA serves a national interest in ensuring that meat sold to American consumers is safe, and that animals that "*are to be* slaughtered" are treated in a manner consistent with that federal interest. 21 U.S.C. § 603 (emphasis added). But the federal law leaves room for the people of California to decide for moral reasons that certain animals are *not* to be slaughtered in their State—namely, animals that are too sick, weak, or crippled to stand and walk on their own. The federal interest in only having safe, wholesome meat on the market is preserved, while California is free to exercise its prerogative to enact

"local laws . . . adapted to local conditions and local tastes." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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