
SEP 10 2010 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,

Respondents,

and

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**

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE AND BRIEF OF THE AMERICAN
ASSOCIATION OF SWINE VETERINARIANS AND
THE NATIONAL PORK PRODUCERS COUNCIL
AS AMICI CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

LANCE W. LANGE

Counsel of Record

WILLIAM B. ORTMAN

BELIN MCCORMICK, P.C.

The Financial Center

666 Walnut Street, Suite 2000

Des Moines, Iowa 50309

Telephone: (515) 283-4639

Email: lwlange@belinmccormick.com

*Counsel for Amici Curiae the American
Association of Swine Veterinarians and
the National Pork Producers Council*

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**MOTION OF THE AMERICAN ASSOCIATION
OF SWINE VETERINARIANS AND THE
NATIONAL PORK PRODUCERS COUNCIL
FOR LEAVE TO FILE A BRIEF AS
AMICI CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rule 37.2, the American Association of Swine Veterinarians (“AASV”) and the National Pork Producers Council (“NPPC”) respectfully move this Court for leave to file the attached brief as *amici curiae* in the above-captioned case. Counsel of record for all parties received timely notice of the intention of the AASV and NPPC to file an *amici curiae* brief at least 10 days prior to the due date. The Petitioner has consented to AASV’s and NPPC’s participation in this matter. An email attesting to its consent has been submitted to this Court. In addition, Intervenor American Meat Institute consents to AASV’s and NPPC’s participation in this matter. An email attesting to its consent has been submitted to this Court. To date, no response has been received from the Respondents as to whether they consent to the filing of this brief.

The AASV is a professional association of veterinarians who care for swine. The organization has approximately 1,300 members involved in practice, industry, and academia in more than 40 countries. The mission of the AASV is to increase the knowledge of swine veterinarians by promoting the development and availability of the resources which enhance the effectiveness of professional activities,

creating opportunities which inspire personal and professional growth, advocating science-based approaches to industry issues, encouraging personal and professional interaction, and mentoring students to encourage life-long careers as swine veterinarians. AASV's website can be found at www.aasv.org.

The NPPC is a 26 U.S.C. § 501(c)(5) nonprofit corporation whose membership consists of forty-three state pork producer associations. As the national trade association for pork producers, the NPCC is dedicated to enhancing opportunities for the nation's thousands of pork producers. The NPPC conducts public policy outreach on behalf of its members and advocates for the passage and implementation of laws and regulations conducive to the production and sale of American pork in both domestic and international markets. The NPPC's website can be found at www.nppc.org.

This case bears directly on meat inspection practices across the country. Swine veterinarians and pork producers have a strong interest in providing input into this issue, as it will directly affect their livelihoods and practices. Swine veterinarians and pork producers are well-situated to explain the impact of this case on both hogs and consumers. Therefore, AASV and NPPC respectfully request the

opportunity to advise this Court more fully on the urgency of granting the petition.

Respectfully submitted,

LANCE W. LANGE

Counsel of Record

WILLIAM B. ORTMAN

BELIN McCORMICK, P.C.

The Financial Center

666 Walnut Street, Suite 2000

Des Moines, Iowa 50309

Telephone: (515) 283-4639

Counsel for Amici Curiae the

American Association of

Swine Veterinarians and the

National Pork Producers Council

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INTEREST OF THE *AMICI CURIAE*

The American Association of Swine Veterinarians and the National Pork Producers Council submit this brief as *amici curiae* in support of the National Meat Association's Petition for Writ of Certiorari.¹ The interests of the *amici* are set out in the accompanying motion.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision permits California to criminalize a federally-mandated process for inspecting and disposing of non-ambulatory pigs. The decision places pork producers and slaughterhouses in the untenable position of facing potential criminal liability under state law in order to comply with federal law. It also endangers public health by short-circuiting the federal government's ante-mortem inspection regime. This Court should grant certiorari to bring the California law (and the Ninth Circuit) in

¹ Counsel of record for all parties received notice of the intention of the AAVS and NPPC to file an *amici curiae* brief at least 10 days prior to the due date. The National Meat Association and the American Meat Institute have consented to the filing of this brief after receiving timely notice from the *amici curiae*. No response was received from the Respondents with regard to consent. No counsel for a party authored this brief in whole or in part, and no counsel or 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.

line with the uniform meat inspection regime created by the Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq.* (the “FMIA”).



ARGUMENT

I. California Penal Code § 599f(c) makes it a criminal offense to hold a non-ambulatory pig in California without immediately euthanizing it. As the petition sets forth, this prohibition runs head-first into the FMIA’s express preemption provision: “Requirements within the scope of [FMIA] with respect to the premises, facilities and operations of any establishment at which inspection is provided . . . 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). Seeking to avoid the obvious preemptive effect of § 678, the court of appeals reasoned that California’s law regulates “the kind of animal” that may be slaughtered, not the “premises, facilities, [or] operations” of slaughterhouses. Pet. App. 9a. Beyond the flaws in the court of appeal’s reasoning with regard to California Penal Code §§ 599f(a) or (b), which are set forth in detail in the petition, this logic manifestly cannot apply to §599f(c).²

² *Amici* agree with the Petitioner that the court of appeals erred by ruling that a “non-ambulatory pig” is a “kind of animal” separate and apart from a “pig.” A non-ambulatory pig is still a
(Continued on following page)

Contrary to the court of appeal's decision, § 599f(c) purports to govern the operations of any California slaughterhouse confronted with a non-ambulatory pig, requiring that the pig be immediately euthanized. The regulations implementing the FMIA, however, impose markedly different obligations. Federal inspectors at slaughterhouses are required to perform ante-mortem inspection of all livestock "offered for slaughter." 9 C.F.R. § 309.1. If, during this inspection, livestock are found to be non-ambulatory, they must "be identified as U.S. Suspects and disposed of as provided in § 311.1 of this subchapter unless they are required to be classed as condemned under § 309.3." *Id.*; 9 C.F.R. § 309.2(b). 9 C.F.R. § 311.1, in turn, provides specific disposal procedures depending on the cause of the animal's infirmity. By mandating that slaughterhouses immediately euthanize non-ambulatory pigs offered for slaughter, the California law short-cuts the federal process. Indeed, California makes it a *crime* to follow

pig. Meat produced from healthy non-ambulatory pigs is indistinguishable from the meat produced from healthy ambulatory pigs. Healthy pigs sometimes lie down due to fatigue. See Joe Vansickle, *Will 'Downer' Sows Be Next?* National Hog Farmer, July 15, 2008, available at <http://nationalhogfarmer.com/behavior-welfare/0715-groups-usda-ban/> (last visited August 18, 2010) ("Pigs become fatigued from overexertion, turning them into downers when they are not given proper rest."); Tyler Kelley, *Don't Let Stress, Heat be a Downer for Pigs*, Pork Magazine, May 2, 2005, available at http://www.porkmag.com/directories.asp?pgID=728&ed_id=3377 (last visited August 18, 2010). Doing so, however, does not make them any less "pigs."

the federal procedures instead of putting the animal down. Plainly, the California statute imposes requirements “different than” those mandated by the federal regulations. It is thus preempted by the FMIA’s express language. 21 U.S.C. § 678.

II. This is no ordinary case of a court misreading a statute. The Ninth Circuit’s reasoning forces a slaughterhouse that discovers a non-ambulatory pig offered for slaughter to commit a crime under the California statute in order to comply with federal regulations.³ But even more significant than the Catch-22 it foists on slaughterhouses, the court of appeal’s misreading of the statute will negatively impact public health.

Federal veterinarians and their trained inspectors conduct both ante-mortem and post-mortem inspections of non-ambulatory swine for a very important reason: both forms of inspection of the animal are required to find and verify the presence of a communicable disease. Ante-mortem inspection is particularly critical in serving as a front-line of defense against the spread of Classical Swine Fever (hog cholera) and Foot & Mouth Disease (a type of vesicular disease). Both of these foreign animal diseases (“FAD’s”) must be detected early to prevent

³ Such confusion would only be exacerbated if Ninth Circuit’s decision is affirmed and more states pass laws that attempt to impact the process of animal inspection at slaughterhouses. Petition at 33-34.

their spread. Federal inspectors have discovered suspected cases of FAD's at slaughterhouses in the past. *See, e.g.*, Devlin Barrett, *Officials brace for foot-and-mouth scare*, USA Today, October 15, 2007, available at http://www.usatoday.com/news/washington/2007-10-15-2261637160_x.htm (last visited September 7, 2010) ("When there were fears of a foot-and-mouth outbreak in the Midwest this summer, the White House received secret briefings that highlighted the potential for old farm diseases to be new national security threats.").

In fact, the USDA's Food Safety and Inspection Service (FSIS) has issued a directive specifically describing the responsibility of federal slaughterhouse inspectors to prevent the spread of FAD's. FSIS Directive 6000.1, Rev. 1, Part VI & VII, available at <http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/6000.1Rev1.pdf> (last visited September 7, 2010). An FSIS entry-level training module for public health veterinarians (PHV's) describing the threat of FAD's states:

The volume of international passenger travel is steadily increasing. In 1980, 20 million passengers arrived in the United States on international flights. In 1995, this number rose 131 percent to 47 million (4). The airline industry expects this trend to continue. International travelers may unknowingly bring contaminated animal products from FAD infected countries. Contaminated foodstuffs have often served as a source of a FAD in the United States and other countries (5).

As the world population grows and animal production intensifies, the risks and impacts of FAD incursions increase. Today, infection at one premises can affect 300,000 laying hens, 100,000 hogs, or 100,000 feedlot cattle. When one company owns a large number of animals, frequent and rapid interstate movement occurs. This movement can spread infection across many states before clinical signs are manifest in the source herd.

See FSIS, Entry Training for the PHV, “Reportable and Foreign Animal Diseases,” at 5, *available at* http://www.fsis.usda.gov/PDF/PHVj-Reportable_and_Foreign_Animal_Diseases.pdf (last visited September 7, 2010). The spread of such FAD’s would have staggering impact on the livestock industries if not prevented through early detection. *Id.*

The FSIS has created a comprehensive training program for the ante-mortem inspection of animals at the slaughterhouse. See *generally* FSIS, Livestock Slaughter Inspection Training, *available at* http://www.fsis.usda.gov/PDF/7b_LSIT_AnteMortem.pdf (last visited September 5, 2010). By depriving FSIS of information gained by conducting both inspections, California is tying the hands of federal inspectors and veterinarians in fighting the spread of dangerous illnesses among swine (and potentially humans). Some of this information can only be determined by viewing the animal in motion during the ante-mortem inspection. *Id.* at 5.

The FSIS Livestock Slaughter Inspection Training manual provides for various steps in the ante-mortem inspection process (and the medical rationale for those steps) as follows:

Ante-mortem inspection consists of two steps:

1. Observe Animals at rest
2. Observe Animals in motion

It is important to inspect the animals using both steps because certain abnormal signs, such as labored breathing, are easier to detect while the animals are at rest, while other abnormalities, such as lameness, are more easily detected while in motion. Since the regulations do not require in motion inspection from both sides, you must use your discretion during ante-mortem. You or your supervisor may determine that in motion inspection from both sides is necessary to determine if the animals are eligible to be passed for regular slaughter. An example of this may be in high pathology cattle plants with a greater incidence of acti, epithelioma, or injection site reactions which all can be unilateral in nature.

Id. at 5. Ante-mortem inspections serve at least two purposes: (1) to determine eligibility for slaughter, and (2) to serve as a front-line detector of communicable diseases. As this manual suggests, certain ailments can only be detected while viewing the animal in motion, which is impossible during a post-mortem inspection. In fact, the manual contains an

extensive list of symptoms of ailments that may only be determined through the abnormal body movement of the animal:

Abnormal Body Movement

Ante-mortem signs that indicate an animal may have a condition or disease referenced in the regulations can be associated with body movement and action, body position, condition, function, surfaces, discharges, and body odor. Some examples of the signs associated with body movement, action and position include:

1. Lameness or limping-sometimes the cause of lameness is rather obvious; sometimes not.
2. Stiffness and pain-lameness may be caused by arthritis in one or more joints.
3. Central Nervous System (CNS) diseases-certain diseases such as rabies and listeriosis can affect the brain and CNS. The animal may appear extremely nervous or restless, excessively anxious or upset, or stagger or circle.
4. Certain poisons and toxic residues that the animal has been exposed to may cause abnormal movement and action, such as staggering or circling.
5. Depression or disinterest may be a sign that the animal is in a dying or moribund state. A moribund animal may not respond to noises or other stimuli. Animals in a

moribund condition are not eligible for slaughter.

6. It is possible that an animal that is depressed or fails to respond normally to stimuli could be under the influence of a tranquilizer. Tranquilized animals are not eligible for slaughter. Tranquilizers and other drugs have specific withdrawal periods that must elapse before the animal is eligible for slaughter.

7. An animal may be disoriented and run into things or butt its head against objects.

8. Animals may scratch excessively or rub their hide against objects. Scratching and rubbing associated with hair loss may indicate that the animal has lice or mange infestation. Scabies is a mange condition that is a reportable disease. The veterinarian must report this condition to other health agencies. These agencies may want to take skin scrapings from the animal to confirm the diagnosis.

9. Animals may have muscle tremors or shivering, hold their head to one side, or have any number of abnormal gaits.

10. Animals may strain and assume abnormal body positions. For example, urinary or intestinal disorders may cause straining and abnormal positions such as arching of the back, tucking in of the

abdomen (stomach), and extending the neck and tail.

11. An animal may have difficulty in rising or be unable to get up at all or be standing but unable to walk (or ambulate). These animals may be recumbent non-ambulatory or standing non-ambulatory for a variety of reasons ranging from an injury to severe illness or depression. All non-ambulatory livestock must be examined by the veterinarian. The veterinarian may choose to examine these animals where they are rather than move them to the U.S. Suspect pen to avoid unnecessary handling and pain or injury to the animal. All cattle that are non-ambulatory when presented for ante-mortem must be condemned.

Id. at 10-11. In addition, the manual requires that inspectors take the temperature of each animal during the ante-mortem inspection process, which is also impossible post-mortem. *Id.* at 10, 13. Certain animals are condemned on the basis of their body temperature alone. *Id.* at 13; 9 C.F.R. § 309.3(c). Taken together, these federal ante-mortem inspection procedures are critical in preventing the spread of diseases, such as hog cholera and vesicular disease. *See* 9 C.F.R. § 309.5 and 9 C.F.R. § 309.15.

By contrast, § 599f(c) turns federal veterinarians into coroners tasked only with the autopsies of a newly-expanded number of often-healthy non-ambulatory swine that were subject to immediate euthanization. By mandating “immediate” euthanization of such

animals, federal veterinarians and inspectors are deprived of the benefit of an examination of the “patient” while that pig is still alive. The retrieval of such ante-mortem data would be a crime under Section 599f, even though it would allow for the only means of detection of certain communicable diseases in swine. Catching a communicable disease early within a swine population could be critical in preventing the spread of the disease within the slaughterhouse. Section 599f places the health of both swine and humans at unnecessary risk. Immediately euthanizing non-ambulatory swine does nothing to improve the public health. Quite the opposite, it threatens the public health by preventing ante-mortem inspection of “downer” swine.⁴

As this Court has previously stated, the FMIA provides for an elaborate system of pre-slaughter animal inspection to protect the public health. See *Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4-5 (1918) (“The [FMIA] provides an elaborate system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products,

⁴ The process of ante-mortem inspection can be viewed as an early-warning detection system that, when in operation, allows the on-site federal veterinarians to make the crucial decision of whether to separate or quarantine the entire swine herd. Post-mortem inspection alone would not allow for this type of early detection of communicable diseases. Regardless, § 599f supersedes the federal regulations that would allow for a non-ambulatory pig to be safely separated from the rest of the herd and placed in a covered pen. See 9 C.F.R. § 313.2(d)(1).

with a view to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products in interstate and foreign commerce.”). That system will be disturbed unless this Court corrects the Ninth Circuit’s error.

◆

CONCLUSION

For the foregoing reasons, as well as those in the petition, certiorari should be granted. Alternatively, this Court should call for the views of the Solicitor General. The federal government has not been heard from on this important question of pre-emption.

Respectfully submitted,

LANCE W. LANGE

Counsel of Record

WILLIAM B. ORTMAN

BELIN McCORMICK, P.C.

The Financial Center

666 Walnut Street, Suite 2000

Des Moines, Iowa 50309

Telephone: (515) 283-4639

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