

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL MEAT ASSOCIATION, :

4 Petitioner :

5 v. : No. 10-224

6 KAMALA D. HARRIS, ATTORNEY GENERAL:

7 OF CALIFORNIA, ET AL. :

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9 Washington, D.C.

10 Wednesday, November 9, 2011

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:04 a.m.

15 APPEARANCES:

16 STEVEN J. WELLS, ESQ., Minneapolis, Minnesota; on
17 behalf of Petitioner.

18 BENJAMIN J. HORWICH, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; for
20 United States, as amicus curiae, supporting
21 Petitioner.

22 SUSAN K. SMITH, ESQ., Deputy Attorney General, Los
23 Angeles, California; on behalf of Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 10-224, National Meat
5 Association v. Harris.

6 Mr. Wells.

7 ORAL ARGUMENT OF STEVEN J. WELLS

8 ON BEHALF OF THE PETITIONER

9 MR. WELLS: Mr. Chief Justice, and may it
10 please the Court:

11 Congress has unmistakably ordained that one
12 set of rules govern animal handling and treatment,
13 inspection, and determinations of meat quality for sale
14 at federally inspected slaughterhouses from California
15 to Maine, and those rules kick in at the slaughterhouse
16 gate, and they continue through the sale of the meat by
17 the slaughterhouse. California has enacted its own set
18 of rules regarding nonambulatory animals, rules which
19 were intended to be and are different than and in
20 addition to the Federal rules regarding the handling of
21 nonambulatory animals.

22 Where Federal law sets requirements for
23 receipt and allows for receipt if the -- if those rules
24 are followed, California law bans receipt of the animals
25 altogether.

1 JUSTICE SCALIA: What about purchase? What
2 about -- what about the contract to purchase? The
3 California law addresses that. Do you -- do you contend
4 that that is pre-empted as well?

5 MR. WELLS: We do, Your Honor. And --

6 JUSTICE SCALIA: How so?

7 MR. WELLS: Justice Scalia, the reason
8 that -- the reason that we do is because, to the extent
9 that purchase is -- is even relevant with respect to a
10 federally inspected slaughterhouse, I think all the
11 parties agree that it occurs on or after the receipt;
12 so, it's part of the operational process.

13 JUSTICE KAGAN: What if it weren't? What if
14 it took place at an auction site apart from the
15 slaughterhouse?

16 MR. WELLS: Well, Justice Kagan, I --
17 because the scope of the FMIA starts at the gate of the
18 slaughterhouse and ends with sale, California, I think,
19 could regulate and not -- not have its regulation be
20 expressly pre-empted if it attempted to prevent purchase
21 before the purchase occurred.

22 JUSTICE SCALIA: Or contract of purchase. I
23 mean, if the contract of purchase is made apart from the
24 slaughterhouse itself, they could make it unlawful for
25 the -- the person who raises the animals to sell them

1 when they're nonambulatory and unlawful for the
2 slaughterhouse to contract to buy them, right, so long
3 as the contract is off the premises?

4 MR. WELLS: So long as the -- so long as the
5 contract -- so long as title didn't pass, Your Honor, or
6 the -- it didn't interfere with what happens on the
7 premises from the gate through sale, then I believe that
8 would not be expressly pre-empted by --

9 JUSTICE SCALIA: Okay.

10 MR. WELLS: -- by Federal law. There could
11 be implied pre-emption issues, however, in that
12 circumstance --

13 JUSTICE SOTOMAYOR: So, your -- your
14 position is if the contract for purchase is consummated
15 in some way on premises, that's pre-empted? And so,
16 your answer to Justice Kagan and Justice Scalia is that
17 if the purchase contract occurs before the animals
18 arrive at the gate of the slaughterhouse, that that
19 would not be pre-empted?

20 MR. WELLS: Not be expressly pre-empted.
21 Again, there may be implied pre-emption issues, but if
22 the law -- I think, Your Honor, if the law is intended
23 to target --

24 JUSTICE SOTOMAYOR: Well, your whole
25 argument is on express pre-emption.

1 MR. WELLS: Yes, Your Honor. Absolutely
2 right.

3 JUSTICE SOTOMAYOR: You've given up any
4 argument on implied.

5 MR. WELLS: Before -- we've not raised that
6 argument before this Court. That's correct.

7 JUSTICE SOTOMAYOR: Please tell me why you
8 think the sale of the meat is expressly pre-empted. The
9 Solicitor General says it's a closer question on sale of
10 the meat because the slaughterhouse processes -- the law
11 is involved only with the operations and -- of the
12 premises and manner of slaughtering and has nothing to
13 do with sales. So, why is the sale of the meat
14 pre-empted?

15 MR. WELLS: Your Honor, sale is a -- it is a
16 practical step. And the word "operations" as used in
17 678, I think all the parties agree it encompasses all
18 the practical steps of the slaughterhouse. Sale clearly
19 is the last practical step, to which all other practical
20 steps are directed. So, it is an operational step. It
21 would be news to the slaughterhouses that sales is not a
22 part of their operations. That's --

23 JUSTICE SOTOMAYOR: So, how about there's a
24 law that says you can't slaughter cats, dogs, or horses,
25 or you can't sell cats, dogs, or horses for slaughter?

1 MR. WELLS: And, Your Honor, it would have
2 to be --

3 JUSTICE SOTOMAYOR: Or for consumption.

4 MR. WELLS: I'd have to put --

5 JUSTICE SOTOMAYOR: Is that pre-empted?

6 MR. WELLS: It -- it would be. Well, with
7 respect to cats and dogs, the answer would be no,
8 because those are not amenable species that are subject
9 to inspection at a federally inspected slaughterhouse.
10 So, that's outside the scope of the FMIA.

11 JUSTICE SOTOMAYOR: Is there a Federal
12 regulation to that effect?

13 MR. WELLS: No -- yes. Only amenable
14 species can be slaughtered. Amenable species are
15 defined at U.S.C. -- 21 U.S.C. section 601 subsection
16 (w). And cats and dogs are not amenable species. So --

17 JUSTICE ALITO: And what's that definition?

18 MR. WELLS: Well, the definition is -- it's
19 kind of a roundabout definition, Your Honor. Amenable
20 species is -- mentions -- I mean, frankly, it mentions
21 catfish and -- and other species, and then all of the
22 animals which were amenable species prior to the
23 amendment of the Act in 2005. We set that forth in
24 footnote 11 of our -- our brief, but it clearly includes
25 swine, and it includes -- it includes horses. It

1 includes cattle, obviously.

2 JUSTICE ALITO: So, the Seventh Circuit
3 and -- and I forget what the other circuit was -- were
4 incorrect in saying that the -- that the State could
5 prohibit the slaughter of horses?

6 MR. WELLS: Yes, Your Honor. I believe they
7 were incorrect, although I would say that, even under
8 the rationale that the Fifth and Seventh Circuits used,
9 their rationale would not save this State law. And the
10 reason that it wouldn't is, even if you were to decide
11 that those -- those cases were decided correctly, the
12 rationale that the court used was we can interpret those
13 States' laws in a way that the -- the laws never have to
14 affect the operations of the slaughterhouse because we
15 can interpret those laws to keep the animals off the
16 slaughterhouse -- off premises.

17 It's easy to identify what's a horse and
18 keep it off the premises. That's not true with
19 nonambulatory animals. Nonambulatory animals present
20 with the symptom of nonambulatory-ness on the premises
21 or on the trucks that are waiting to arrive on the
22 premises. So, there is no way that this State law could
23 be interpreted in a way not to operate on premises.

24 JUSTICE ALITO: Well, doesn't it seem
25 strange to hold that the Federal Meat Inspection Act

1 speaks to an issue like that? This doesn't have
2 anything -- whether or not horses should be slaughtered
3 and sold and their meat should be sold doesn't have
4 anything to do with food safety, does it? And it
5 doesn't have anything to do with humane treatment,
6 assuming the same methods of slaughter are used?

7 MR. WELLS: Well, I would disagree, Your
8 Honor. It clearly has to do -- this issue clearly has
9 to do with both of those issues. As the State has
10 admitted on page 6 of its brief, this law was intended
11 to address both -- both humane handling of animals,
12 which is covered directly in section 603(b) of the -- of
13 the Federal --

14 JUSTICE ALITO: No, I wasn't speaking of the
15 California law. I was speaking of the law that
16 prohibits the -- the slaughter of horses --

17 MR. WELLS: Well--

18 JUSTICE ALITO: That's based just on a
19 judgment, a societal judgment, that this is an animal
20 that should not be slaughtered and sold for food. What
21 does that have to do with any of the purposes of the
22 Federal Meat Inspection Act?

23 MR. WELLS: Well, because Congress has made
24 a different -- a different judgment, Justice Alito; and
25 what Congress has said is we have identified -- we,

1 Congress, have made a moral judgment that the following
2 species are amenable and may be inspected on
3 slaughterhouse premises. And to the extent that the
4 State is making a different moral judgment --

5 JUSTICE SCALIA: And that presumably is why
6 Congress excluded cats and dogs?

7 MR. WELLS: That -- Congress -- correct.

8 JUSTICE SCALIA: So, Lassie -- Lassie and
9 Kitty are no good?

10 MR. WELLS: Congress made a moral judgment
11 that --

12 JUSTICE SCALIA: But Dobbin is all right.

13 MR. WELLS: I believe that's right, Your
14 Honor. It's a moral -- it is a moral judgment by
15 Congress as to which animals are going to be amenable
16 for slaughter and which ones aren't.

17 JUSTICE KAGAN: Mr. Young, you suggested
18 that even if the Seventh Circuit was correct, there
19 would still be a difference because of ease of
20 identification. You can tell a horse is a horse and
21 keep the horse away from the slaughterhouse. Would it
22 be possible to say the same thing about nonambulatory
23 swine? And I guess my question is, do nonambulatory
24 swine usually become nonambulatory in transit or at the
25 slaughterhouse, or could you identify such swine

1 earlier?

2 MR. WELLS: They -- nonambulatory swine
3 become nonambulatory -- may become nonambulatory in
4 transit. They may become nonambulatory on the
5 slaughterhouse premises. The only way that the
6 slaughterhouse operator knows that an -- that an animal
7 that has been transported has become nonambulatory,
8 however, is when the truck is brought onto the premises,
9 the gates are thrown open, and the animals are
10 shepherded off, and one of them doesn't move.

11 JUSTICE SCALIA: But I guess the -- the
12 State could make it unlawful for a rancher or -- what
13 are the people that ship the animals to you called?
14 Could it --

15 MR. WELLS: Could be a rancher or a farmer.

16 JUSTICE SCALIA: A rancher or farmer could
17 make it unlawful for them to ship a nonambulatory swine,
18 could they not?

19 MR. WELLS: Your Honor, Congress actually
20 has enacted regulations that don't -- they don't apply
21 to slaughterhouses because, again, the scope with
22 respect to slaughterhouses started at the slaughterhouse
23 gate.

24 JUSTICE SCALIA: Yes, but as far as this
25 statute is concerned, it would not preclude a State law

1 that forbids a -- a rancher to -- to ship a
2 nonambulatory swine, right?

3 MR. WELLS: That's correct. There are
4 Federal -- I should point out, there are Federal
5 regulations that govern the transportation of dead,
6 dying, and diseased animals. They don't apply to
7 slaughterhouses. They may apply in the situation that
8 Your Honor is contemplating.

9 CHIEF JUSTICE ROBERTS: I would have thought
10 that your argument on sales would apply at the front end
11 as well. You say sales can't be regulated because it's
12 really just a way to get to the regulation of what goes
13 on at the slaughterhouse. Wouldn't that concern also
14 apply at the front end?

15 MR. WELLS: Well, Your Honor, our argument
16 about sale is slightly different, and it's a little
17 different than the argument that's being made by the
18 Government. Our argument with respect to sale is there
19 are requirements specifically regulating sale. That's
20 found in 21 U.S.C. section 610(c). That says,
21 essentially, meat may not be sold if it is adulterated,
22 or, to put it another way, you may sell the meat if it's
23 unadulterated. So, that's a requirement. It's within
24 the scope of the FMIA. It -- it goes directly to sales
25 as an operation.

1 And it is different than and in addition to
2 the State regulation because what the State -- the State
3 adds another condition. They say you may not sell the
4 meat if it is from a nonambulatory animal, or, looked at
5 the other way, you may sell the meat as long as it's not
6 from a nonambulatory animal.

7 CHIEF JUSTICE ROBERTS: Well, that -- isn't
8 that logically not -- doesn't that logically not follow?
9 You may not sell meat if it's been adulterated doesn't
10 mean that you can sell meat so long as it's not been
11 adulterated; right?

12 MR. WELLS: Well, no. I think --

13 CHIEF JUSTICE ROBERTS: One is a limitation,
14 not a grant.

15 MR. WELLS: Well, I think, though, that
16 there were -- I think that -- the Federal -- what the
17 Federal Government has done is established a requirement
18 for the sale of meat. California has established
19 another requirement for the sale of meat.

20 Under Federal law, one requirement for the
21 sale of meat is that it not be adulterated, that it pass
22 through inspection, that it be stamped "USDA approved,"
23 all the conditions that happen at a slaughterhouse. The
24 State, though, has set forth a different condition, and
25 that is you may not sell that meat unless it comes from

1 a nonambulatory animal --

2 JUSTICE ALITO: Well, isn't it the case that
3 most nonambulatory animals become nonambulatory because
4 of the method of transportation that's used? Do you
5 dispute the statistics in the brief of the non-State
6 Respondent that -- Respondents that, nationwide,
7 approximately 220,000 swine die during transport,
8 another 440,000 become nonambulatory during the
9 transportation process?

10 MR. WELLS: I don't -- Your Honor, the short
11 answer is I don't know where those statistics come from,
12 and to my knowledge they are not accurate. But I don't
13 have additional statistics to --

14 JUSTICE ALITO: Do you dispute the fact that
15 the reason -- that ranchers generally do not ship
16 animals that are nonambulatory at the time when the trip
17 begins, but that most of these nonambulatory animals
18 become nonambulatory during the transportation process?

19 MR. WELLS: I think that is a fair
20 assumption, Your Honor, with respect to pigs that
21 present being nonambulatory when -- when the doors to
22 the -- to the truck are opened. I think that that's
23 correct. I think that the practice is not to ship
24 nonambulatory animals if you know beforehand that they
25 are nonambulatory.

1 JUSTICE ALITO: And you think it's difficult
2 to identify which animals are nonambulatory? That's the
3 difference between horses -- between prohibiting the
4 slaughter of horses, because you can tell whether it's a
5 horse or a pig, but you can't tell whether a pig can
6 walk?

7 MR. WELLS: No. It isn't the only
8 difference, Your Honor. Really, it -- the -- what I'm
9 really saying is the -- the condition of being
10 nonambulatory presents on the slaughterhouse premises.
11 And so, there is no way for a law to -- no way for us to
12 say the California law can be interpreted in a way that
13 will not tell a Federal slaughterhouse what to do and --
14 and how to do it with respect to nonambulatory animals.
15 That's not true in the horse case. In the horse case,
16 you can say keep the horses out. The -- the Federal
17 slaughterhouse doesn't have to have anything to do with
18 horses. So --

19 JUSTICE KAGAN: Would it be possible --

20 JUSTICE SOTOMAYOR: Can you tell me, if it's
21 okay for California to say you can't sell a
22 nonambulatory animal and that that applies to everyone
23 off the slaughterhouse premises, is that -- that's
24 basically your position. So that if the purchase occurs
25 on premises, then the person who's selling it, even if

1 it's not the slaughterhouse, can still sell it on the
2 premises?

3 MR. WELLS: If I understand your question,
4 Your Honor, if the -- if, let's say just for the
5 shorthand, if title passes on the premises, if that's
6 how it's understood in the industry and that's what it
7 is, that would be pre-empted. But if the law took
8 effect --

9 JUSTICE SOTOMAYOR: What a -- what a
10 fascinating area of immunity. Now what we're saying to
11 auction houses and everyone else is don't pass title
12 until you get to the slaughterhouse.

13 MR. WELLS: Well, Your Honor, it's just -- I
14 mean, I think the -- the real question is what has the
15 Federal Government said about nonambulatory animals in
16 general, and are those amenable species and may they
17 be -- may they be slaughtered and turned into food? And
18 the Federal regulations deal directly with that
19 situation. So, whether title passes before or after, if
20 the animal is on the Federal premises, there are a whole
21 series of Federal regulations that tell the
22 slaughterhouse worker exactly what the worker is
23 supposed to do with that animal.

24 JUSTICE KAGAN: Does that mean that a State
25 could actually pass a law and create a facility, let's

1 say, that says -- the law says the trucks have to stop
2 at the State facility before it gets to the
3 slaughterhouse, and at the State facility, we'll check
4 to see whether there are nonambulatory animals and make
5 sure that those animals don't go on to the
6 slaughterhouse? Would a State be within its rights to
7 do that?

8 MR. WELLS: Your Honor, the language of
9 section 603(a) says that the inspection is to occur
10 before they enter the slaughterhouse. Now, that has
11 been interpreted by the Secretary to essentially mean
12 immediately before; so -- so, trucks in line.

13 So, I think, under -- on Your Honor's
14 hypothetical, if the State had set up their own
15 inspection program right immediately outside of a -- of
16 a federally inspected slaughterhouse, that currently
17 would be within the scope of the FMIA, because that's
18 how the Secretary has defined it. The further upstream
19 it goes, though, the -- the less likely it is to be
20 expressly pre-empted.

21 JUSTICE ALITO: Well, if they do it at the
22 weigh station that a truck has to stop at when it enters
23 the State, that would be okay?

24 MR. WELLS: That would not be expressly
25 pre-empted, Your Honor. There might be implied

1 pre-emption issues.

2 And if there are no further questions, I'd
3 like to reserve my remaining time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Horwich.

6 ORAL ARGUMENT OF BENJAMIN J. HORWICH

7 ON BEHALF OF THE UNITED STATES,

8 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

9 MR. HORWICH: Mr. Chief Justice, and may it
10 please the Court:

11 I haven't heard any quarrel this morning
12 with the proposition that if an animal goes down, say,
13 as it's entering the abattoir to be slaughtered, that
14 the State cannot at that point tell the slaughterhouse
15 how it is to handle that animal.

16 But that is not any different, of course,
17 than the situation where a pig goes down as it's coming
18 off the truck, or it presents as nonambulatory when the
19 gates of the truck are opened, because it's still an
20 operational consideration; the same humane handling
21 requirements still apply; it's still a State
22 requirement; and it's not -- it's still different from
23 the Federal requirements.

24 So, the Court's questions this morning, I
25 think, have gone to kind of the situations at the

1 margins, at the extreme. So, let me try to -- try to
2 address some of those questions.

3 The -- the question about whether -- the
4 question about the purchase of the nonambulatory animal
5 and the regulation, the regulation there, the first
6 thing is, as a practical matter, I think you have to
7 think about it in a concrete situation, which is that
8 there is a nonambulatory animal that's on the
9 slaughterhouse premises. That's the hypothetical that
10 we're in. And the question is, what is the
11 slaughterhouse employee to do with that animal? And the
12 State law says, well, you can't buy it, you can't hold
13 it, you can't receive it, you can't turn it into meat,
14 and you have to immediately euthanize it.

15 JUSTICE ALITO: Well, before you get to that
16 point, the animal has to be transported. Does Federal
17 law regulate for humane purposes the transportation of
18 animals to slaughterhouses?

19 MR. HORWICH: There are Federal laws
20 regarding transportation. The Federal Meat Inspection
21 Act has not been interpreted by the Secretary to apply
22 specifically to trucks that are in transit, although I
23 should say that the Secretary has, for example,
24 interpreted the FMIA -- and this is in part 309.1(b) --
25 to apply, at least to the extent of humane handling, to

1 pens at stockyards that are committed exclusively to a
2 slaughterhouse.

3 And I think if there were a situation such
4 as I think, Justice Kagan, your hypothetical envisioned,
5 where a State determined that it wanted to essentially
6 assert an inspection jurisdiction over animals that were
7 in transit to a slaughterhouse -- so, essentially
8 between the pen and the slaughterhouse -- the Secretary
9 might well recognize that -- that his authority needs to
10 extend -- needs to extend to those, because the purpose
11 of the Act, after all, is to set a Federal inspection
12 standard for animals to determine if they're suitable to
13 be turned into meat. And in your --

14 JUSTICE ALITO: Well, if the Federal -- if
15 Congress has not chosen to regulate the transportation
16 of animals to prevent inhumane treatment in transit, why
17 should a State law that aims at that objective be
18 pre-empted?

19 MR. HORWICH: Well, if you -- if you
20 disagree with -- if you disagree with me about the scope
21 of the FMIA in that regard, the State law with respect
22 to the handling of the animals while they're in transit
23 wouldn't be pre-empted. But, of course, the injunction
24 that I understand Petitioners to be seeking is not one
25 that goes to State regulation of trucks but, rather, to

1 State regulation of animals that are on the
2 slaughterhouse premises. And the Secretary has made
3 unmistakably clear that the scope of the FMIA is at
4 least as large as the official slaughter establishment's
5 premises.

6 JUSTICE ALITO: Well, if the State could
7 inspect the trucks at a weigh station before they get to
8 the slaughterhouse, why can't they do the same thing
9 when they get to the slaughterhouse, where it's more
10 practical to do that?

11 MR. HORWICH: Well, accepting the premise of
12 your hypothetical that the State could do the inspection
13 on the truck --

14 JUSTICE ALITO: Do you dispute -- you
15 dispute that?

16 MR. HORWICH: I dispute that, but I'll
17 accept that premise. Even if I accept that premise, the
18 question here is different because the Secretary has
19 drawn a line that says the scope of the FMIA -- and
20 that's -- the question is the scope of Federal law here.
21 That's in section 678. The Secretary has made very
22 clear that the scope of the FMIA extends to -- to all
23 animals that are on the premises of the establishment.
24 That's -- you can look at appendix --

25 JUSTICE GINSBURG: So, is there anything

1 saved to the State? I mean, there is a savings clause.
2 Once you get to the entrance to the slaughterhouse, is
3 there any room for any State regulation?

4 MR. HORWICH: Absolutely, Justice Ginsburg.
5 I mean, State laws of general applicability would, to
6 the extent they don't in some particular application
7 intrude into the scope of the FMIA, they would apply.

8 And I also want to be very clear, so that
9 there's no mistaking the Government's position: State
10 prosecutions for animal cruelty are not pre-empted to
11 the extent they are prosecuting conduct that is unlawful
12 under Federal law, because that is -- that is an example
13 of a State that is not applying a different or an
14 additional standard of conduct but simply adding --
15 applying its own sanction for conduct that Federal law
16 would similarly sanction. So, there's absolutely room
17 for State -- the application of State law on the
18 premises of the slaughterhouse.

19 JUSTICE KENNEDY: In that respect, do State
20 inspectors routinely go on the premises of
21 slaughterhouse to ensure that their coextensive laws are
22 properly enforced? And if that's so, are there problems
23 of judgment, that a Federal inspector says, no, this is
24 okay under Federal law, and the State official says, no,
25 this is not okay under the State law, even though they

1 say the same thing?

2 MR. HORWICH: I'm -- I am not aware that in
3 general State inspectors or other State officials would
4 go to a federally inspected premises as a general
5 matter. But let's assume for the sake of argument that
6 they were, and then your question -- excuse me --
7 presents the question about these sort of differences in
8 judgment that might be made. The Federal regulations
9 generally provide that the disposition made by
10 veterinarians, by Federal veterinarians, is the
11 conclusive judgment of the Secretary as to the fitness
12 of the animal for turning into meat. And so, in that
13 situation, the State official would not be able to reach
14 a different judgment on that question. And so, I -- so,
15 I think that would resolve any situation where State
16 officials were there.

17 Of course, the situation where State
18 officials do inspections is the one that the Act itself
19 envisions and that California has not taken the
20 opportunity to implement, which is for intrastate-only
21 plants, States can enact their own inspection
22 regulations and have their own inspectors there as long
23 as they're following Federal standards at a minimum.

24 JUSTICE BREYER: What am I supposed to do --
25 I have a quick procedural question, which I think is

1 similar to Justice Ginsburg's. Suppose this is three
2 sections, the State law, and some of them have three
3 parts. Suppose I thought, well, the word "buy" -- I
4 mean, "buy" might cover an awful lot of things that
5 don't have much to do with operations. Maybe sometimes
6 they do. Suppose I ended up thinking that, but I
7 thought you were right about all the rest of it. What
8 am I supposed to do?

9 MR. HORWICH: Well, I would like to have an
10 opportunity to take issue with your premise. But the
11 answer your question --

12 JUSTICE BREYER: No, no, no. I'm just doing
13 that hypothetically.

14 MR. HORWICH: Yes. Yes. The answer to your
15 question is this case comes here on preliminary
16 injunction; so, I think the Court could appropriately
17 articulate its answer and its understanding of the
18 different provisions, and that probably would then lead
19 to the lower courts working out the particulars of the
20 injunction.

21 But let me actually make a point in that
22 regard about what the injunction might or might not look
23 like with respect to the buying provision, which is that
24 I don't understand the State to have some free-floating
25 interest in when title does or doesn't pass. The State

1 is interested in regulating what animals can be
2 purchased because of a background principle of State law
3 that I assume exists, that slaughterhouses can't
4 slaughter things they don't own.

5 And if you put those two pieces together,
6 the ban on buying is nothing -- is nothing but doing in
7 two steps what the State clearly can't do in one step,
8 which is tell slaughterhouses how they are to deal with
9 an animal that is on their premises. At least, they
10 can't -- States can't tell slaughterhouses how to do
11 that when there is a Federal regulation on the subject.

12 JUSTICE SCALIA: Do we have to peel this
13 onion in order to decide this case? I mean, do we have
14 to go through --

15 JUSTICE BREYER: Yes.

16 JUSTICE SCALIA: -- each little provision of
17 the statute and say this is in, this is out, this is in,
18 this is out?

19 MR. HORWICH: Well, I have --

20 JUSTICE SCALIA: Can't we just either affirm
21 or reverse the particular preliminary injunction that
22 was -- that was issued here?

23 MR. HORWICH: I think the Court could --
24 could do that, although I think there's some concern
25 that if the Court were to find -- to have some concern

1 with some specific aspect of the injunction -- and I
2 guess I would let Petitioner's counsel speak to this --
3 there would be some concern that vacating the injunction
4 so that it could be corrected would leave the -- the
5 Petitioner in a spot where it wouldn't have protection
6 from the vast majority of provisions --

7 JUSTICE BREYER: But what I discover is
8 there are at least 11 different provisions in this, and
9 I have exactly Justice Scalia's question. Do we have to
10 write an 11-part opinion where we treat each of these
11 different things, which are different, separately and
12 analyze it? I'm not trying to get out of the work. I
13 just want to know.

14 (Laughter.)

15 MR. HORWICH: Well, I think -- I think the
16 Court --

17 JUSTICE SCALIA: I'd like to get out of the
18 work, to tell you the truth.

19 (Laughter.)

20 MR. HORWICH: The right way to get out of
21 the work would be to understand that -- that California
22 has made every effort here to implement a provision
23 that -- to implement one underlying requirement, which
24 is that it wants to tell slaughterhouses: Don't turn
25 these animals into food; immediately euthanize them

1 instead. And the rest of these are just ways of
2 implementing that underlying requirement. And this
3 answers your question --

4 JUSTICE BREYER: Suppose we agree with you
5 about that. We say, if I agree with you about that,
6 there we are; you're supposed to pick up this animal
7 which is on the slaughterhouse floor and kill it right
8 away. That seems to have to do with operations. All
9 the rest of these other 10 provisions are just
10 variations on that theme, according to the Government,
11 and we send it back for them to argue this out below.

12 MR. HORWICH: If there would be anything
13 left to argue out below at that point. I think --

14 JUSTICE BREYER: Well, there are 10 other
15 parts. There are 10 other parts.

16 MR. HORWICH: Well, there are the 10 parts,
17 but I actually want to answer -- well --

18 CHIEF JUSTICE ROBERTS: You want to give a
19 one-sentence answer?

20 MR. HORWICH: I think I can.

21 -- Justice Sotomayor's question, which is
22 the question about the sale of the meat, which, again, I
23 think fits under the rubric that it's just implementing
24 the underlying prohibition that California seeks here.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Ms. Smith.

3 ORAL ARGUMENT OF SUSAN K. SMITH
4 ON BEHALF OF THE RESPONDENTS

5 MS. SMITH: Mr. Chief Justice, and may it
6 please the Court:

7 In order to be pre-empted here, the State
8 provisions have to be -- excuse me -- the State law
9 provisions have to be within the scope of the Act and
10 with respect to the premises, facilities, and
11 operations. None of the State provisions are within the
12 scope, and some are not even operations.

13 JUSTICE SOTOMAYOR: How do you define the
14 scope?

15 MS. SMITH: The scope are the -- the
16 mandates of Federal law dealing with the method,
17 quality, and marketing of turning animals into meat for
18 human consumption.

19 JUSTICE SOTOMAYOR: All right. So, now
20 explain how under your definition it's not among at
21 least one of those.

22 MS. SMITH: None of the provisions are
23 within the scope because California is not regulating
24 animals that are going to be turned into meat. And the
25 Federal Meat Inspection Act, the purpose of the Act, the

1 legislative history of the Act, show that the scope of
2 the Act is concerned with animals that are going to
3 become meat.

4 JUSTICE KAGAN: Well, is that true, Ms.
5 Smith? I thought that under the Federal program some of
6 these animals could become meat, that under the Federal
7 program, you take a nonambulatory animal and you say,
8 well, some of them might be condemned, but some of them
9 are suspect, and if they're only suspect, it may be that
10 eventually they'll be turned into meat.

11 MS. SMITH: That is correct. But the entire
12 purpose of the Act is to inspect and examine animals to
13 determine whether or not their meat will be wholesome
14 and unadulterated.

15 JUSTICE SCALIA: Well, no. No. Provisions
16 of the Act, at least as amended, also require humane
17 treatment of the animals while they're being processed.
18 That has nothing to do with whether the meat is any
19 good. It has to do with humane treatment of the
20 animals.

21 MS. SMITH: The humane treatment of the
22 animals deals with animals in the connection of
23 slaughter or while being slaughtered. And the animals
24 that California is regulating, the nonambulatory animals
25 that we're withdrawing from the process, will not be

1 slaughtered, will not be turned into meat. Even the --

2 JUSTICE SCALIA: Wait. I don't -- you mean
3 the Federal requirements of humane treatment do not
4 apply once the slaughterhouse decides that this animal
5 will not be slaughtered for meat; then the
6 slaughterhouse can do whatever it wants with the poor
7 animal? That can't be right.

8 MS. SMITH: Well, the language of the
9 regulations -- of the Federal regulations dealing with
10 U.S. condemned animals, for instance, say that U.S.
11 condemned animals shall be killed and shall not be
12 slaughtered and dressed in the same facility with
13 animals that will be turned into meat. So, even in the
14 regulations there's a distinction between animals that
15 will be slaughtered for meat and that will be edible and
16 ones that are -- are condemned and will be killed.

17 JUSTICE SCALIA: What about the provision
18 that says that they will not be exposed to sharp --
19 sharp instruments that can injure them? Does that apply
20 to only those that are going to be sold for meat?

21 MS. SMITH: It applies to -- well,
22 specifically the provisions in the Federal Meat
23 Inspection Act apply to the animals that are going to be
24 turned into meat. To the extent they apply to other
25 animals or all animals as has been referenced, they

1 would be pursuant -- those provisions would be pursuant
2 to the Humane Methods of Slaughter Act, which is -- does
3 not have a pre-emption clause and does not --

4 JUSTICE SCALIA: Well, wait, no. But that
5 Act amends, amends, the Act that does have a pre-emption
6 clause.

7 MS. SMITH: Correct.

8 JUSTICE SCALIA: And, therefore, it seems to
9 me the pre-emption clause applies to the humane
10 provisions as well.

11 MS. SMITH: It applies to the humane
12 provisions with animals -- with respect to the animals
13 in connection with slaughter and that will be
14 slaughtered, with respect to the Federal Meat Inspection
15 Act. Because the Humane Methods of Slaughter Act was
16 not incorporated into the Federal Meat Inspection Act,
17 it does not have an express pre-emption clause, and
18 there's no language in the text of that Act, the Humane
19 Methods Act, or in the legislative history showing that
20 it was an attempt to federalize animal cruelty law, for
21 instance. So, the idea that --

22 JUSTICE SCALIA: Just in slaughterhouses. I
23 mean, to the extent it's incorporated in that Act, it
24 only applies to humane treatment by slaughterhouses,
25 right?

1 MS. SMITH: Correct. 603 and 610 of the
2 Federal Meat Inspection Act reference the Humane Methods
3 Act and reference that that is to be applied when the
4 animals are in the -- being processed in the connection
5 with slaughter and being slaughtered. So, again, it
6 is -- it is limited to the animals that -- that are
7 going to become meat under the Federal Meat Inspection
8 Act.

9 CHIEF JUSTICE ROBERTS: But they don't --
10 you don't know whether they're going to become meat
11 until after the Federal process of post-mortem
12 inspection and all of that. And your rules seem to
13 prohibit that.

14 MS. SMITH: Our rules -- well, the ante-
15 mortem inspection and post-mortem inspection are
16 required of animals that are going to be turned into
17 meat, correct. And our -- the California law does not
18 touch on post-mortem inspection at all. And only in the
19 case -- excuse me. And the -- as far as --

20 CHIEF JUSTICE ROBERTS: No, but I mean
21 your -- your argument up to this point has been that
22 this doesn't interfere with the Federal laws because the
23 Federal laws are designed only to deal with meat that is
24 for consumption. And you say with your -- with respect
25 to your animals, that's not what it is.

1 But here, as I understand the Petitioner's
2 and the Government's position, it is that nonambulatory
3 animals can be turned into meat for consumption. So,
4 you don't know whether it fits under the definition of
5 the State law until you've violated it.

6 MS. SMITH: No, because when an animal
7 becomes nonambulatory, it is readily apparent. That's a
8 characteristic that is readily apparent. And in -- at
9 least in California, when the animal becomes
10 nonambulatory, the requirement would be to immediately
11 euthanize the animal because it's not part of the meat
12 supply system.

13 JUSTICE KAGAN: But that's exactly where the
14 California system diverges from the Federal system
15 because under the Federal system you separate the animal
16 out, and then you take a look at it, and then you decide
17 whether that animal can continue to go through the
18 process and eventually become meat, or whether you
19 euthanize it. So, the California system commands an
20 action that the Federal system say may be necessary but
21 may not be.

22 MS. SMITH: It commands an action, but it's
23 not within the scope of the Act because at the very
24 outset California is saying that these animals are not
25 to be part of the meat supply system in California.

1 JUSTICE SCALIA: Well, but --

2 JUSTICE KAGAN: Where the Federal system has
3 said maybe they should be part of the meat supply
4 system.

5 MS. SMITH: They may be part of the meat
6 supply system, but it's not required. It's not --
7 nonambulatory animals are not --

8 JUSTICE BREYER: But in any case, it's --
9 look, this is a simple question that occurs. I am an
10 inspector at a federally inspected meat facility. I
11 look around, and there is a -- a cow and it's lying
12 down. All right? It seems to me that your law says I
13 have to go over and see that it is immediately
14 euthanized.

15 Now, how is that not what is forbidden, a
16 requirement -- the exact words are -- "in addition to or
17 different from the Federal requirements governing the
18 operations of that Federal meatpacking facility."

19 The Federal law does not require me
20 immediately to go over and euthanize the cow. Your law
21 does require me to go over and immediately euthanize the
22 cow. And, therefore, your law seems an additional
23 requirement in respect to the operations of a -- a
24 federally inspected meatpacking facility. Now, that
25 seems to me the obvious, simple argument that people

1 have been making, and I would like to know your obvious,
2 simple answer.

3 MS. SMITH: Certainly, Your Honor. The
4 euthanization is an operation of the slaughterhouse.
5 But it's -- but this -- California's provision is not
6 within the scope. And pursuant to 678, to be expressly
7 pre-empted, it has to be within the scope and with
8 respect to operations.

9 So, with respect to that provision, the
10 euthanization provision, we concede that it is -- it is
11 part of the operations. But it is not within the scope
12 because we're dealing with an animal that California has
13 deemed as not part -- as -- excuse me --

14 JUSTICE SOTOMAYOR: I understood that the
15 Federal regulation -- you can correct me if I'm
16 misunderstanding -- is that if there is a suspect animal
17 of any kind, that it requires a slaughterhouse to wait
18 until the Federal inspector comes and finds out whether
19 it's just suspect or it's something that can't be sold.

20 And the reason why the inspection occurs, as
21 I understand it, is that there are some diseases that
22 are so contagious that if the inspector decides that
23 that animal is carrying that disease, that the whole lot
24 will be quarantined or otherwise destroyed. So, are you
25 fighting with -- that that's what the purpose of

1 pre-inspection under the Federal system is for?

2 MS. SMITH: The distinction I would make,
3 Your Honor, is that the purpose of the ante-mortem
4 inspection is to determine if the -- if the animal's
5 meat will be wholesome and unadulterated. To the extent
6 that the pre-inspection or the inspection also finds
7 diseases that can be passed on to other animals or -- or
8 to the rest of the herd, that's -- that's certainly a
9 benefit, but it's not part of the purpose of the Federal
10 Meat Inspection Act.

11 JUSTICE SOTOMAYOR: I'm having a hard time
12 drawing that distinction. If there is a valid purpose
13 to the pre-mortem inspection -- and I can't see how you
14 can argue otherwise -- that there may be some diseases
15 that are so contagious that the entire lot, ambulatory
16 or nonambulatory swine, are affected, then I don't see
17 how you can argue that you aren't trenching on the scope
18 of the statute. If the scope of the statute is to
19 ensure that meat is unadulterated and if there is the
20 risk of contagion, that has to be within the scope.

21 MS. SMITH: Two points. One, the diseases
22 that were referenced by the amicus dealing with this are
23 diseases that will be passed to the animals, not to
24 humans.

25 And the second point is that the -- the

1 purpose, again, of the Act as specified in 602 is to
2 make sure that the meat of the animal is wholesome and
3 unadulterated. And the ante-mortem inspection will
4 occur for every animal that goes into the meat supply
5 system.

6 So, if California withdraws a nonambulatory
7 animal, it doesn't receive the ante-mortem inspection,
8 it's not going into the meat supply system. But all of
9 the other animals in that pen that are ambulatory,
10 pursuant to the Federal law, will receive that
11 ante-mortem inspection and will, by the inspector or the
12 veterinarian, be declared disease free or not. So, they
13 will find -- they will be able to find those diseases in
14 the ambulatory animals and the ones that are going into
15 the meat supply system.

16 JUSTICE KAGAN: So, I suppose what you're
17 saying, Ms. Smith, is that California or any State is
18 entitled to take certain categories of animals outside
19 of the whole process, to exclude certain categories of
20 animals from the whole process and so to exclude them,
21 if you will, from of the scope of this chapter. And
22 much as the Seventh Circuit said a State can simply
23 exclude horses from the scope of this statute, you're
24 saying a State can exclude nonambulatory swine from the
25 scope of this statute.

1 But then you have to, you know, ask yourself
2 the question: Are nonambulatory swine so easily
3 excludable as horses? Why couldn't the State then
4 exclude swine with various kinds of diseases? And then
5 it would be clear that the State was doing something
6 that the Federal statute is supposed to be doing.

7 MS. SMITH: Your Honor, if your question is,
8 would that be pre-empted if California excluded pursuant
9 to other diseases, it would not be expressly pre-empted.
10 So, California can make decisions on categories of
11 animals, here nonambulatory swine, and the -- it would
12 not be expressly pre-empted. There may be questions
13 about conflict pre-emption, but in this particular case,
14 conflict pre-emption was litigated in the Ninth Circuit,
15 and the Ninth Circuit found that there was no conflict
16 pre-emption.

17 JUSTICE SCALIA: Well, it's an additional
18 requirement. I don't know why it's conflict
19 pre-emption. It's express pre-emption. If indeed the
20 Federal regulations say that these diseases disqualify
21 the animal from being slaughtered and sold as meat, and
22 California says no, we think additional diseases should
23 disqualify the slaughter and sale, that's an additional
24 requirement. I don't know how you say that's somehow
25 conflict pre-emption. It's express pre-emption.

1 MS. SMITH: It's not expressly pre-empted
2 because it's not within the scope, because California is
3 not putting requirements on animals --

4 JUSTICE SCALIA: You keep saying "not within
5 the scope." I don't know what you mean by "not within
6 the scope." Why is it not within the scope?

7 MS. SMITH: Because the scope of the Federal
8 Meat Inspection Act does not include every animal on the
9 premises of a slaughterhouse. It's limited by the
10 language of the -- of the text of the Federal Meat
11 Inspection Act and the authority given to the Secretary.

12 JUSTICE SCALIA: Right, and what -- what
13 limits it? What enables the State to disqualify other
14 diseases that the Federal law does not disqualify?

15 MS. SMITH: California would -- there's no
16 requirement in -- there's nothing in the text of the
17 Federal Act that specifies that States cannot withdraw
18 animals based --

19 JUSTICE SCALIA: "No additional
20 requirements" is what the Act says.

21 MS. SMITH: Correct. But that is -- no
22 additional requirements going to animals that are going
23 to become meat. If California -- if California had a --

24 JUSTICE SCALIA: Well, it doesn't say that.
25 It says "no additional requirements" with respect to all

1 of the operations, both the operations that pertain to
2 those animals that are later sold as meat and the
3 operations that pertain to those animals that are
4 slaughtered and whose carcasses are burned or disposed
5 of. How do you get the limitation to only those animals
6 that are -- that are slaughtered for meat?

7 MS. SMITH: Because it's also within the
8 scope. Within the scope is part of the -- of the -- of
9 678. The express pre-emption clause references within
10 the scope of the chapter with respect to premises,
11 facilities, and operations. So, there -- the scope of
12 the chapter must be considered in terms of what the
13 purpose is, what the language of the text allows the
14 Federal Government --

15 CHIEF JUSTICE ROBERTS: So, your argument is
16 that because the Act doesn't speak to whether or not
17 cats and dogs and horses can be sold as meat, you can
18 also say it's not within the scope because it doesn't
19 speak to specifically whether nonambulatory animals can
20 be sold as meat or not.

21 MS. SMITH: Correct, and since, Mr. Chief
22 Justice --

23 CHIEF JUSTICE ROBERTS: Well, that seems to
24 me -- what you're saying then with respect to animals
25 that are slaughtered in a slaughterhouse is that the

1 difference is that the State law says you can't sell
2 that as meat while the Federal law says you can. Right?
3 In other words, you're saying, well, just because the
4 Federal law says you can doesn't mean that the State
5 can't say you can't.

6 MS. SMITH: Correct.

7 CHIEF JUSTICE ROBERTS: Correct? Well,
8 isn't the exact flip side of saying you can sell it is
9 that -- that you can't sell it is that you can. So,
10 when the Federal law says you can, that pre-empts the
11 rule from the States that says you can't.

12 MS. SMITH: Well, the Federal law doesn't
13 say you must. It does not say you must sell the meat or
14 you must --

15 JUSTICE SCALIA: But we're not talking about
16 conflict pre-emption. If it said you must and the State
17 says you can't, then there would be conflict
18 pre-emption. But we're talking about express
19 pre-emption, which says in so many words no additional
20 requirements. And I don't know how you can get around
21 the fact that this is an additional requirement.

22 MS. SMITH: Because the "no additional
23 requirements" has to be qualified within the scope of
24 the Act.

25 JUSTICE BREYER: It does, you're right.

1 You're right. I see where you're going. It says we're
2 talking about regulations that are within the scope of
3 the Act. But I have assumed that that means we're not
4 talking about airplanes; we're talking about the subject
5 matter of the Act. And so, is this the kind of
6 regulation that is within the subject matter of the Act?
7 And it seems to be. It has to do with how you slaughter
8 animals. It has to -- I mean, if you're going to be so
9 specific as you say the only things that are within the
10 scope of the Act are the specific requirements that are
11 there already in the Federal Act, then this prohibition
12 against extra regulations means nothing.

13 I mean, it can't mean that. So, it just
14 means the subject matter. And now, if it means the
15 subject matter, then why don't you lose?

16 MS. SMITH: This -- well, even if one looks
17 at the subject matter instead of the scope of the Act --

18 JUSTICE BREYER: What do you mean, instead
19 of? What is the scope of the Act? Are you saying the
20 scope of the Act refers only to those particular
21 provisions that are already in the Act, requirements
22 already there?

23 MS. SMITH: Yes, the scope of the Act --

24 JUSTICE BREYER: Yes? Then why did they put
25 in something saying you can't add anything?

1 MS. SMITH: Because the "in addition to" is
2 qualified by on the -- with respect to the premises,
3 facilities, and operations and within the scope of the
4 Act.

5 JUSTICE SOTOMAYOR: But you define the scope
6 almost exclusively by purpose. And regulatory power is
7 broader than purpose, I mean, as is reflected by the
8 regulations here which are dealing not merely with
9 animals that are adulterated but are dealing with the
10 whole process of what happens from the minute they
11 arrive to the minute they're sold. So, if we don't
12 accept your limitation based on a scope being defined by
13 purpose, how do you win?

14 MS. SMITH: If one looks at the authority
15 given to the Secretary as well in 621, the authority is
16 specified as dealing with -- or making sure that no
17 adulterated meat or any carcass, part of carcass, meat
18 food product therefor is not adulterated. So, the focus
19 in 621 on the Secretary's authority is on making sure
20 that -- that the meat is not adulterated. So -- so,
21 it's not simply the -- the purpose of the Act at 602 but
22 also the scope of the authority given to the Secretary.

23 JUSTICE SOTOMAYOR: Well, you seem to be
24 assuming that in effecting its obligations that only
25 when it finds adulterated meat is that within the -- the

1 scope. The Government has basically said: We've got to
2 figure out if it is, and this is how we're going to do
3 it: We're going to do it starting from the receipt of
4 the swine through its sale, and we're going to have
5 inspections all through the process, whether or not the
6 meat will ultimately be sold or not; our scope is what
7 happens in that slaughterhouse. That --

8 MS. SMITH: Correct. But the -- the focus
9 of the Secretary's authority, as well as the specified
10 purpose of the Act, is focused on not all animals, but
11 animals that will eventually become meat and making a
12 determination, by inspections or examinations, whether
13 or not -- whether or not those swine or those meat will
14 be wholesome and not adulterated.

15 JUSTICE BREYER: I -- I didn't see your
16 argument, and now I see it. Okay. So, I understand
17 where you're going.

18 But then if I look at section 610 of the
19 Act, it has a whole bunch of prohibitions, including
20 prohibitions and references to how you slaughter
21 animals, and including how you slaughter animals
22 humanely. So, there, how do you say that this provision
23 which talks about euthanizing an animal that you look
24 around and it's lying down -- how is that not within the
25 scope of the Act? I'm not saying that they have that

1 particular thing, but the subject matter, slaughtering
2 animals, indeed humanely, is something the Act
3 absolutely deals with.

4 MS. SMITH: It -- as I mentioned earlier,
5 it's certainly part of the operations. Euthanization
6 is --

7 JUSTICE BREYER: No, I didn't say that. I
8 said yes, it's part of the operations, but also it's the
9 subject matter with which the Act deals. The Act deals
10 with the humane slaughter of animals and other forms of
11 slaughter of animals. So, how -- how is -- so, I repeat
12 my question.

13 MS. SMITH: It deals with animals in
14 connection with slaughter and that will be slaughtered.
15 And so, to the extent that that -- that slaughter is
16 seen as an animal that is going towards the meat supply
17 system, as opposed to one that's condemned and being
18 killed and not -- not --

19 JUSTICE BREYER: Okay. I see. That's what
20 you said before --

21 JUSTICE SCALIA: I don't think that's what
22 within the scope means. The pre-emption provision here
23 in the statute has two provisions. The first one, which
24 is the one we're talking about, says requirements within
25 the scope of this chapter with respect to premises,

1 facilities, and operations which are in addition to or
2 different than those made under this chapter may not be
3 imposed. That's the first one. Okay? Requirements
4 within the scope with respect to premises, facilities.

5 Now, the second pre-emption provision reads:
6 "marking, labeling, packaging, or ingredient
7 requirements in addition to, or different than, those
8 made under this chapter." Now, I read the difference
9 between those two being, under number two it has to be
10 different from something that has been made; whereas
11 under number one, it just has to be different from
12 anything that could have been made under this chapter.

13 It's within the scope of the chapter. It's
14 within the Secretary's authority to prescribe under this
15 chapter. I think that's what Congress meant by the
16 difference between requirements within the scope and, in
17 number two, "in addition to, or different than, those
18 made," and that to my mind is -- is a much more
19 plausible explanation of "within the scope" than -- you
20 know, it's directed to the purpose of -- of the statute.

21 I don't think within the scope has anything
22 to do with the purpose. It has to do with whether the
23 Secretary is authorized to act in this field under the
24 chapter.

25 MS. SMITH: And as -- as I mentioned, the

1 Secretary is given several -- at several different
2 points authority to act under this chapter, and the
3 Secretary's authority is -- is circumscribed to making
4 sure that meat is not adulterated and setting up
5 inspections and examinations --

6 JUSTICE SOTOMAYOR: I'm sorry. You're not
7 seriously arguing that the Secretary couldn't regulate
8 in the manner California has, that the Secretary is
9 powerless under this Act to say you can't slaughter
10 animals that can't walk?

11 MS. SMITH: No. The Secretary has done --

12 JUSTICE SOTOMAYOR: The Secretary could do
13 that?

14 MS. SMITH: Yes. The Secretary -- yes.

15 JUSTICE GINSBURG: Because that would be a
16 requirement? Is that -- is that -- do you rely heavily
17 on -- on the distinction between a requirement and
18 something that's merely permissive?

19 MS. SMITH: No, we don't. Our -- our focus
20 is on -- on the scope of the Act and not on
21 requirements. We -- we concede that the -- that
22 California statute is setting out requirements, the
23 requirements in the penal code dealing with animal
24 cruelty in -- in areas traditionally regulated by the
25 State. So, we -- we do not dispute that the -- the

1 provisions in the State law are requirements.

2 JUSTICE KAGAN: But suppose, Ms. Smith, you
3 decided that the Secretary was not doing a good job in
4 terms of inspecting for disease. So, I guess that
5 there's some disease called diamond skin disease which
6 affects a lot of pigs. And you just thought that the
7 inspection standards were far too lenient, and you said,
8 okay, we're not going to allow pigs with diamond skin
9 disease to be slaughtered. Under your theory you could
10 do that, too; isn't that right?

11 MS. SMITH: Yes, we could because we would
12 be categorically withdrawing the animal from -- from the
13 process. I want to be clear, though, we're not -- with
14 this law we are not setting up an inspection and
15 examination process. It's -- this provision is in the
16 penal code. It's an animal -- it's within the animal
17 cruelty statutes. It is not an attempt to set --

18 JUSTICE KAGAN: But in fact it requires a
19 parallel inspection system. It's trying to do the exact
20 same thing that the Secretary is trying to do, which is
21 trying to remove animals with a certain kind of disease,
22 and it requires an inspection system of its own.

23 MS. SMITH: In our -- our case or in your
24 hypothetical?

25 JUSTICE KAGAN: In my hypothetical case.

1 MS. SMITH: In your hypothetical --

2 JUSTICE KAGAN: And then I think that the
3 cases seem similar to make.

4 MS. SMITH: Well, it -- it would not be
5 expressly pre-empted, the hypothetical that you have
6 given me, because we're withdrawing these animals from
7 the scope of the Act. There may be questions about
8 conflict pre-emption in that -- in that example, but
9 with respect to what we're doing, what the California
10 provision is doing there, it's not setting up a parallel
11 provision. It's not trying to set up a --

12 JUSTICE SCALIA: The other argument is that
13 it is within the scope of the Act because it is
14 pre-eminently something that the Secretary is authorized
15 to regulate, this nefarious diamond skin disease which
16 we're all familiar with.

17 (Laughter.)

18 JUSTICE SCALIA: It's within the scope of
19 the Act, because he could act and indeed is -- is told
20 to act to prevent stuff like that. And that's why it's
21 within the scope of the Act for California to do
22 something in addition to what he has chosen to do.

23 And that's why there's a difference between
24 one and two, requirements within the scope, and
25 marketing, labeling, and packaging requirements in

1 addition to or different from those made. This one
2 isn't made, but it is within the scope of what the
3 Secretary could make. And, therefore, California should
4 butt out.

5 MS. SMITH: Let me be precise about -- if
6 one -- if one saw that -- that paragraphs (b) and (c) of
7 the California law were within the scope, there's still
8 an argument that they have to be with -- part of the
9 operations, the premises, facilities, and operations.
10 And certainly with respect to requirement (a), the
11 buying, selling, and the sale of meat, those are not
12 necessarily operations. And we do dispute the -- the
13 factual assertion that's been made that all purchasing
14 happens on the -- on the slaughterhouse grounds.
15 There's no -- no factual record of that in the -- in the
16 lower record. We have no way to dispute that because it
17 was not -- it was not litigated.

18 JUSTICE SCALIA: Suppose I agree with you on
19 that but don't agree with you -- or least I'm dubitante
20 on that and -- and disagree with you on the rest. What
21 do I do?

22 MS. SMITH: We believe the -- the law could
23 be or would be severable. In the Ninth Circuit, the
24 preliminary injunction went to all provisions except for
25 subparagraph (e). We would have to litigate

1 severability, of course, but we do think that it would
2 be severable, and it seems that the Ninth Circuit --

3 CHIEF JUSTICE ROBERTS: What -- what purpose
4 does the ban on buying and selling have, other than to
5 implement the restrictions that go to operations?

6 MS. SMITH: Well, the purpose of the
7 California law is twofold. One, general public health,
8 but there's also a very strong component of prohibiting
9 animal cruelty. And so, prohibiting the purchase,
10 buying, selling, or the sale of meat --

11 CHIEF JUSTICE ROBERTS: But that seems to me
12 to be, the answer, that, no, it doesn't have anything
13 else to do because the animal cruelty that you're
14 concerned about takes place on the premises as a result
15 of the operations. And so, you prohibit the buying and
16 selling of an animal that wasn't treated the way you
17 think it should be treated, to give effect to your views
18 on how it should or should not be treated, which seems
19 to be expressly pre-empted.

20 MS. SMITH: Well, not necessarily, because
21 the law -- if we look at the entire California penal
22 code section, it's dealing not just with
23 slaughterhouses. So, it is trying to deal with a
24 comprehensive problem that it sees with respect to
25 nonambulatory animals, not just at the slaughterhouse

1 but at other market agencies, et cetera -- and livestock
2 agencies. And so -- so, the focus on purchasing,
3 buying, receipt, selling of the meat is to prohibit and
4 -- and stop the -- the commerce in nonambulatory
5 animals.

6 And California's purpose there, as I said,
7 was twofold, to, one, protect general public health but
8 also to prohibit animal cruelty in an area where --
9 where California legislators were concerned about the
10 humane treatment of nonambulatory animals, not just
11 swine, because the law is broader than that, but that's
12 what's at issue here today.

13 CHIEF JUSTICE ROBERTS: What does it include
14 besides swine?

15 MS. SMITH: It includes cattle, sheep,
16 goats, and swine. And the preliminary injunction was
17 brought --

18 CHIEF JUSTICE ROBERTS: Those are -- those
19 all go through slaughterhouses?

20 MS. SMITH: They do. They do. And --

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Wells, you have 4 minutes remaining.

23 REBUTTAL ARGUMENT OF STEVEN J. WELLS

24 ON BEHALF OF THE PETITIONER

25 MR. WELLS: Thank you. I just have a couple

1 of quick points to make. One is that the Secretary has
2 interpreted the -- section 602 and section 603 and
3 section 604 to require that all animals be handled --
4 all animals on the premises be handled humanely and that
5 all animals be subject to the regulations under the
6 chapter. That's set forth in 9 C.F.R. 302.3, and it's
7 also set forth in the Secretary's directives. It's
8 directive 6100 at appendix at 47.

9 So, the Secretary does not make a
10 distinction in implementing section 602 through 604
11 between animals that the State may choose to try to
12 categorically remove. It applies to all animals, and
13 that is critical because a State -- a slaughterhouse
14 worker who is on the premises needs to have one set of
15 rules that -- that the worker follows so that the worker
16 knows that if he follows the advice of a Federal
17 inspector and, for example, puts a nonambulatory
18 animal -- separates the animal, puts it in a covered
19 pen, and lets it go through the ante-mortem inspection
20 that it's required to have under Federal law, that the
21 slaughterhouse worker won't go to jail.

22 And that's why it's critical that -- to
23 Congress -- that was critical to Congress that we had
24 this uniformity, and I think it's critical that this
25 Court find pre-emption in this case because otherwise

1 Federal law will appear and disappear, apparently, based
2 on when the State believes that it's removing animals
3 from -- in connection with slaughter, whenever that
4 would occur.

5 Just one other point, and that is it is also
6 crystal clear that the Humane Methods of Slaughter Act
7 of 1978 incorporated the standards of humane treatment
8 that were included in the Humane Methods of Slaughter
9 Act of 1958, and it isn't just the preamble to that
10 public law that indicates that.

11 Those requirements are found now in 21
12 U.S.C. section 603(b), and they are backed up by
13 prohibitions which are backed up by criminal penalties
14 in section -- in 21 U.S.C. section 610 -- yes, 610(b).

15 And if the Court has no more questions, I'll
16 conclude my remarks.

17 CHIEF JUSTICE ROBERTS: Thank you counsel,
18 counsel.

19 MR. WELLS: Thank you.

20 CHIEF JUSTICE ROBERTS: The case is
21 submitted.

22 (Whereupon, at 11:04 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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