

**Petition Before the United States Department of Agriculture,
Food Safety and Inspection Service**

September 2, 2023

**Petition Requesting Notice Clarifying the Limits of Federal Preemption, and FSIS' Role in
the Enforcement of State Anti-Cruelty Laws**

Submitted by Animal Partisan

Will Lowrey, Legal Counsel
Animal Partisan
11357 Nuckols Road, #138
Glen Allen, Virginia 23059
(804) 307-4102
wlowrey@animalpartisan.org

Isabella O'Connor, Law Clerk
Animal Partisan

I. SUMMARY OF REQUEST

Pursuant to 5 U.S.C. § 553(e), 9 C.F.R. § 392, 7 C.F.R. § 1.28, and the First Amendment of the United States Constitution,¹ Animal Partisan respectfully requests that the United States Department of Agriculture’s (“USDA”) Food Safety and Inspection Service (“FSIS”) issue a notice conveying the following points:

1. State government officials—including law enforcement, prosecutorial, administrative, and others—are not categorically or automatically preempted from enforcing state anti-cruelty laws by the Federal Meat Inspection Act (“FMIA”), Humane Methods of Slaughter Act (“HMSA”), or the Poultry Products Inspection Act (“PPIA”); and
2. FSIS personnel should endeavor to cooperate with state government officials in the enforcement of state anti-cruelty laws, including through commitment to improving the clarity and frequency of communications with state officials, such as Letters of Concern (“LOC”).²

In addition to issuing a notice addressing these points, we request that the FSIS incorporate these points into the language of all relevant materials, including future LOCs as well as the following directives:

- Humane Handling and Slaughter of Livestock, FSIS Directive 6900.2;
- Verification of Good Commercial Practices, FSIS Directive 6110.1; and
- District Veterinary Medical Specialist (DVMS) – Work Methods, FSIS Directive 6910.1.

II. DESCRIPTION OF PETITIONER

Animal Partisan is a legal advocacy organization whose mission is to end the suffering of animals in slaughterhouses, farms, and laboratories by discovering, exposing, and challenging unlawful conduct in all its forms.³

III. BASIS FOR ACTION

Each state and the District of Columbia has anti-cruelty laws that criminalize the abuse and neglect of animals, including farmed animals.⁴ Although many state laws contain “common

¹ U.S. Const. amend. I.

² See Verification of Poultry Good Commercial Practices, FSIS Directive 6110.1, FOOD SAFETY AND INSPECTION SERVICE-UNITED STATES DEPARTMENT OF AGRICULTURE, Section V(B); District Veterinary Medical Specialist (DVMS) – Work Methods, FSIS Directive 6910.1, FOOD SAFETY AND INSPECTION SERVICE-UNITED STATES DEPARTMENT OF AGRICULTURE, Section III(A)(2)(d).

³ *Home*, Animal Partisan, <https://www.animalpartisan.org/> (last visited July 13, 2023).

⁴ Appendix A: Animal Welfare Institute, *Legal Protections for Animals on Farms*, page 1, <https://awionline.org/sites/default/files/uploads/documents/22-Legal-Protections-Farm.pdf> (May 2022).

practice” exemptions that exclude certain routine agricultural practices from criminalization, in general, these laws do not categorically exclude farmed animals from *all* protections. Nonetheless, protections for farmed animals afforded by state anti-cruelty laws are frequently overlooked and underenforced.⁵

Although the causes of this systemic failure to enforce anti-cruelty laws are varied and complex, individuals pursuing enforcement of these laws frequently encounter one common barrier: state prosecutors and/or law enforcement authorities unwilling to act. Unfortunately, many state government officials mistakenly believe that the USDA has sole and complete jurisdiction over any animal welfare issue related to agriculture and therefore, over the enforcement of state anti-cruelty laws as applied to farmed animals. This has given rise to the pervasive myth that federal statutes like the FMIA, HMSA, and the PPIA inherently preempt *any enforcement* of state anti-cruelty laws in cases involving farmed animals. Consequently, when concerned parties seek recourse for animal cruelty inflicted on farmed animals, they are frequently met with resistance from prosecutors and law enforcement officials who believe that state anti-cruelty laws *do not* and *cannot* apply to farmed animals.

Though non-exhaustive, the prevalence of this misconception is evidenced by the following examples, as further detailed in Appendix F:

1. On April 19th, 2019, People for the Ethical Treatment of Animals (“PETA”) wrote to the Washoe County DA’s Office to report instances of farmed animal abuse in Nevada.⁶ Chief Investigator and Public Information Officer Michelle M. Bays responded to the message and said, “...your concerns center around U.S Department of Agriculture issues and they may be the better agency to work with. We also do not have jurisdiction in Federal matters.”⁷ This comment implied that Bays believed the abuse of farmed animals was a “federal matter” regulated solely by the USDA, and that state law was inapplicable.
2. In June 2020, PETA submitted a request to Commonwealth Attorney Bethany Harrison to investigate several incidents of cow mistreatment that occurred at the Seven Hills Abattoir (“SHA”) slaughterhouse in Virginia.⁸ PETA asserted that SHA employees

⁵ *Id* at 5, in reference to prosecutors rarely prioritizing animal cruelty charges; *see also* Appendix B: JDS Communications, *Broken tails in Holstein dairy cattle: A cross-sectional study*, (2023), stating that nearly 50% of dairy cows “assessed for broken tails had broken tails, which is greater than the 5% of broken tails permitted under the National Dairy FARM Program.”; *see also* Appendix C: Craig A. Wenner, *Judicial Review and the Humane Treatment of Animals*, 86 N.Y.U. L. Rev. 1630, 1636 (2011), stating that anti-cruelty laws often fail to protect animals; *see also* Appendix D: David J Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, Lewis and Clark L. Rev (1996) citing Charles Friend, *Animal Cruelty Laws: The Case for Reform*, 8 U. Rich. L. Rev. 2215-2220; Appendix E: Cheryl Leahy, *Do Animals Protection Laws Address Widespread Cruelty? Unique Challenges and Potential for Addressing Institutional Abuse to Farmed Animals*, 32 Southern Cali. Rev. of L. and Social Justice 138- 146 (2023).

⁶ Appendix G.

⁷ *Id.*

⁸ *Id.*

violated Virginia’s state cruelty laws by improperly stunning cows—causing unnecessary pain and suffering.⁹ On September 4, 2020, Harrison responded to PETA's request with a letter of denial.¹⁰ Harrison shared two key reasons for the denial of PETA's request—one of which was federal preemption under the FMIA.¹¹ She noted that because slaughter is exclusively regulated by the FMIA, additional charges could not be filed, even if they violated state welfare provisions.¹²

3. On July 9th, 2020, PETA wrote to the Talladega County District Attorney (“DA”) to report animal cruelty at a local Alabama slaughterhouse.¹³ PETA informed DA Steve Giddens that Marble City Meat (“MCM”) recently violated the USDA’s slaughter guidelines, and was likely also in violation of Alabama’s state anti-cruelty laws.¹⁴ In response to PETA’s letter, Giddens replied, “It looks like the appropriate authority is handling this matter,” implying that (1) the USDA had already taken action to address the issue, and (2) the USDA is the only governing body with the authority to regulate MCM’s activities—suggesting state law is inapplicable.¹⁵ PETA attempted to clarify the law in a subsequent letter but received no further response from Giddens.
4. In December of 2021, Animal Equality sought charges against a Foster Farms hatchery for violating California’s animal cruelty statute. Animal Equality was told by the Stanislaus County Sheriff's Office that the USDA, not local law enforcement, had jurisdiction over animal cruelty issues for livestock.
5. On June 3rd, 2022, Animal Outlook sought criminal charges against the Case Farms chicken hatchery in Morganton, North Carolina for violating the state’s animal cruelty law. Animal Outlook appeared in person before Burke County Magistrate C.L. Webb. After reviewing the complaint and contacting the Burke County DA’s Office, Magistrate Webb informed Animal Outlook that, according to the DA’s Office, remedies must be sought exclusively through the USDA. Animal Outlook disputed this conclusion as legal error, but Magistrate Webb refused to consider the complaint any further, believing that USDA jurisdiction prevented any further action.¹⁶

Confusion regarding a state’s ability to enforce its own anti-cruelty laws for issues involving farmed animals is not limited to state officials. In fact, Petitioner Animal Partisan has firsthand

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ This conversation occurred verbally at the Burke County Magistrate’s Office. While no written record exists, the author of this petition was party to the conversation and will attest to its accuracy.

experience with this issue when dealing directly with the FSIS. On March 2, 2023, Animal Partisan submitted a *Tuohy* demand¹⁷ to the USDA’s Office of General Counsel and the FSIS requesting the testimony of an inspector at a pending criminal trial involving alleged animal cruelty that occurred at a federally inspected pig slaughterhouse in Pennsylvania.¹⁸ On March 30, 2023, Animal Partisan spoke via telephone with Stephanie Snowden, Senior Litigation Specialist at the FSIS’ Office of Investigation, Enforcement, and Audit about the demand letter. Ms. Snowden stated that they “had never seen a request like this” before and believed that the matter “had already been handled,” suggesting that even the FSIS believed that a state animal cruelty prosecution was obviated by the FSIS Notice of Suspension previously issued in the matter.

State officials and the FSIS are not alone in their confusion. The fallacy is so pervasive that the Associated Press, while writing about a PETA investigation depicting acts of cruelty at a kosher slaughter plant in Iowa, once stated conclusively and falsely that “The state has no jurisdiction over meatpackers.”¹⁹

These examples represent only a small subset of instances in which animal protection organizations attempting to obtain enforcement of state anti-cruelty statutes in cases involving farmed animals have been rebuffed by state government officials and others operating under an erroneous interpretation of the law.

While these examples represent tangible instances in which the misperception regarding the USDA’s authority impeded the enforcement of state anti-cruelty laws, they do not fully depict the scope of potential state anti-cruelty violations occurring at federally inspected slaughter establishments. FSIS Noncompliance Records, Notices of Suspension, and Memoranda of Interview depict horrific acts of abuse and neglect that may have also violated state anti-cruelty laws. A non-inclusive list of examples from January 2019 to January 2023 is included in Appendices I (poultry) and J (livestock). These incidents include animals being beaten with lumber, shovels, and pipes, punched, kicked in the face, thrown, hoisted by their tails, having feathers forcefully pulled while conscious, forced to trample one another, deprived of food and water, and subjected to other acts of violence and neglect.²⁰

Contrary to the misperceptions regarding the USDA’s authority, federal laws do *not* inherently preempt all state anti-cruelty statutes. Although case law and the FSIS’ own administrative materials already disprove this falsehood, the FSIS has never formally and proactively clarified

¹⁷ See 7 CFR §§ 1.210-1218 for full regulations related to “Production or Disclosure of Official Information in Legal Proceedings”.

¹⁸ Appendix G: *Tuohy* Demand for *Commonwealth of Pennsylvania v. Leidy’s, Inc.*, Animal Partisan (Mar. 2, 2023)

¹⁹ Appendix H: T. Dvorak, *Tour of kosher plant reveals company’s view of events*, Associated Press (carried by the Waterloo-Cedar Falls Courier), https://wfcourier.com/news/regional/tour-of-kosher-plant-reveals-companys-view-of-events/article_e888e6a3-5e05-5ac8-9db4-3e771359ca1e.html (last visited July 13, 2023).

²⁰ Appendix I: Possible poultry cruelty/neglect incidents as documented by USDA-FSIS records, January 2019-January 2023); Appendix J: Possible livestock cruelty/neglect incidents as documented by USDA-FSIS records, January 2019-January 2023).

this intersection of the law. Accordingly, it is likely that the FSIS’ silence on this matter exacerbates the prevalence of the preemption fallacy and impedes the enforcement of state anti-cruelty laws for incidents such as those described in Appendices I and J.

The FSIS’ issuance of the requested notice and accompanying edits to existing directives and materials would serve as an invaluable educational aid for state prosecutorial and law enforcement officials across the country and would bolster the welfare protections for farmed animals nationwide. Moreover, it would provide meaningful guidance to the FSIS’ own employees in establishing expectations for cooperation with state officials. The requested notice is also consistent with the FSIS’ own repeated statements conveying its willingness to inform state officials of incidents which may have violated state anti-cruelty laws.²¹

IV. BASIS FOR ISSUANCE OF A NOTICE

Animal Partisan requests that the FSIS issue a notice—either in the Federal Register, or on the agency’s “FSIS Notices” webpage, or both—conveying the points described in this petition. Such a notice would be appropriate because this petition does not request rulemaking and because the agency has used such notices in the past to issue similar reminders and clarifications regarding the welfare of animals and the responsibilities of inspection personnel in slaughter establishments. For example, in 2004, FSIS published a notice in the Federal Register “encouraging livestock slaughter establishments to use a systematic approach to humane handling and slaughter to best ensure that they meet the requirements of the HMSA, FMIA, and implementing regulations.”²² Similarly, in 2005, it issued a notice “reminding poultry slaughter establishments that, under the [PPIA] and Agency regulations, live poultry must be handled in a manner that is consistent with good commercial practices, which means they should be treated humanely.”²³

As an alternative, or in addition, to a Federal Register notice, the agency could publish a one-year notice on its “FSIS Notices” webpage. It has recently posted slaughter-related notices there such as “FSIS Sampling of Fowl Slaughtered under the New Poultry Inspection System (NPIS)

²¹ FSIS Directive 6910.1, District Veterinary Medical Specialist (DVMS) – Work Methods, FOOD SAFETY AND INSPECTION SERVICE-UNITED STATES DEPARTMENT OF AGRICULTURE, p.20, https://www.fsis.usda.gov/sites/default/files/media_file/2020-07/6910.1.pdf (last visited July 13, 2023) (“The DVMS, in collaboration with OPEER, may notify appropriate State officials of findings that could be in violation of State and local animal welfare codes.”); FSIS Directive 61 10.1, Verification of Poultry Good Commercial Practices, FOOD SAFETY AND INSPECTION SERVICE-UNITED STATES DEPARTMENT OF AGRICULTURE, p.5 (“In specific situations, after DVMS review of a mistreatment MOI, there may be a need for additional notification of the appropriate state officials.”).

²² Humane Handling and Slaughter Requirements and the Merits of a Systematic Approach to Meet Such Requirements, 69 Fed. Reg. 54,625, 54,625 (Sept. 9, 2004).

²³ Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56,624, 56,624 (Sept. 28, 2005) (Sept. 28, 2005).

as Authorized by Waiver” and “Availability of FSIS Guideline for Controlling Salmonella in Swine Slaughter and Pork Processing Establishments.”²⁴ These notices contain updated instructions to FSIS personnel about how to perform their inspection responsibilities in slaughter facilities. Similarly, the notice requested by this petition would include revised instructions to FSIS personnel about how to engage with appropriate state officials when instances of potential animal cruelty occur in slaughter establishments.

IV. LEGAL FRAMEWORK

A. The HMSA, FMIA, and Federal Preemption (21 U.S.C. § 678)

The FMIA contains a preemption provision that limits the ability of states, territories, and the District of Columbia from regulating federally inspected slaughter establishments. It 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 or Territory or the District of Columbia”²⁵ For purposes of regulating the humane handling of livestock at slaughter facilities, the FMIA incorporates the HMSA.²⁶ Thus, the requirements referred to in the FMIA’s preemption provision include those related to humane handling and slaughter.

In sum, states may not impose “additional or different” requirements on slaughterhouse “premises, facilities, and operations” that fall within the scope of the FMIA or HMSA.²⁷ Regrettably, many state officials interpret this provision as enacting a complete ban on the enforcement of state anti-cruelty laws for farmed animals. This improper interpretation of the law has been expressly rejected by the Supreme Court.

In *National Meat Association v. Harris*, the Supreme Court determined that a California state law requiring the “immediate euthanization of nonambulatory pigs” and a complete ban on the sale of their meat, was preempted by the FMIA.²⁸

The Court found that nonambulatory animals fell under the “scope” of the FMIA—meaning the “handling and treatment of nonambulatory pigs” is considered an “operation” that is expressly and exclusively regulated by the FMIA.²⁹ In addition, the Court concluded that California’s new euthanasia requirements imposed “additional or different requirements on swine

²⁴ USDA, FSIS, FSIS Notices, <https://www.fsis.usda.gov/policy/directives-notices-guidelines/fsis-notices?page=1>.

²⁵ 21 U.S.C. § 678.

²⁶ 21 U.S.C. § 603(b).

²⁷ *Id.*

²⁸ *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012).

²⁹ *Id.* at 970 and 975.

slaughterhouses” by creating a “new regulatory scheme” that directly conflicted with federal law.³⁰ Under the FMIA, slaughterhouse workers are permitted to use a variety of methods to kill nonambulatory animals—none of which include immediate lethal injection.³¹ Lastly, the Court found that the statewide ban on nonambulatory animal meat directly opposed a slaughterhouse’s ability to determine which animals were fit for human consumption—a duty granted to those slaughterhouses by the FMIA.³² In summary, the Court held that the California law required slaughterhouses to follow “different” requirements that directly conflicted with those already enacted by FMIA.³³ Consequently, the Court concluded that the statute was preempted.³⁴

Importantly, however, the Court clarified that this *does not mean that all state anti-cruelty statutes are preempted by the FMIA or the HMSA*. The Supreme Court stated that “...because the FMIA's express preemption provision prevents States from imposing only ‘addition[al]’ or ‘different’ requirements, [] States may exact civil or criminal penalties for animal cruelty or other conduct that also violates the FMIA. . . Although the FMIA preempts much state law involving slaughterhouses, it thus leaves some room for the States to regulate.”³⁵ Thus, the highest court has held that while it is possible for the enforcement of a state animal welfare statute to violate the FMIA's preemption provision—such as in *Harris* where the law imposed “different” requirements—they do not *inherently* do so. Instead, *Harris* informally creates a two-step analysis that determines whether the FMIA preempts state action.

First, courts must ask if the state law regulates activities that fall under the same “scope” as the FMIA or the HMSA with respect to federally inspected “premises, facilities and operations.” If not, then there can be no federal preemption. If it does, then the courts must ask whether the state law imposes requirements that are “additional or different” from those imposed by the two acts, or if it simply enforces “equivalent” state rules that “regulate animal cruelty or other conduct that also violates the FMIA.”

For example, the HMSA provides that livestock “shall have access to water in all holding pens and, if held longer than 24 hours, access to feed.”³⁶ If a state anti-cruelty statute required all livestock to be fed at least once every 36 hours, then this law would fall within the same

³⁰ *Id.* at 966, stating that “Where under federal law a slaughterhouse may take one course of action in handling a nonambulatory pig, under state law the slaughterhouse must take another.”

³¹ *Id.*

³² *Id.* at 972-973

³³ *Id.* at 968

³⁴ *Id.*

³⁵ *Id.* at n.10; *cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 432 (2005) (holding that a preemption clause barring state laws that are “in addition to or different from” a federal Act does not interfere with an “equivalent” state provision that is “fully consistent” with the federal provision).

³⁶ 9 C.F.R. § 313.2(e) (1988).

“scope”³⁷ of the FMIA/HMSA as it regulates the welfare of animals at slaughter. However, it would not impose any “additional or different” requirements than those already set out in the act, because the 36-hour requirement is “fully consistent with” current federal regulations and regulates “conduct that also violates the FMIA”—and thus, is valid both inside and outside of slaughterhouses. In contrast, if a state anti-cruelty statute required livestock to be fed at least once every 8 hours, this law would fall within the same “scope” of the act but would impose a “different” requirement than the current 24-hour rule set by federal law. As a result, the state law would remain valid outside of the confines of a federally inspected slaughterhouse, but enforcement would be preempted by the FMIA/HMSA inside all federally inspected slaughter facilities.³⁸

Similarly, if a state anti-cruelty statute prohibits any animal from being “beaten”, “abused”,³⁹ “tortured”, “mutilated”,⁴⁰ or “tormented”,⁴¹ the law—as applied to livestock at slaughter—falls within the “scope” of the HMSA as it regulates the welfare of animals at slaughter. However, as applied to the act of driving livestock from unloading ramps to holding pens, such requirements would be equivalent to and not “in addition to or different than” the HMSA’s requirements that these animals are handled with a “minimum of excitement and discomfort.”⁴² Thus, state officials are not preempted from enforcing these anti-cruelty laws.

In sum, *Harris* stands for the proposition that states may still enforce anti-cruelty laws operating within the same “scope” as the HMSA so long as such laws do not impose “additional” or “different” requirements. Thus, contrary to the false assertions depicted in the examples above, state officials are not automatically preempted from enforcing their own laws merely because the act was inflicted upon livestock.

³⁷ See *Sican v. JBS S.A.*, No. 422CV00180RGEHCA, 2023 WL 2643851 (S.D. Iowa Mar. 23, 2023) for a further discussion on the “scope” prong of the preemption analysis. In *Sican*, the plaintiffs sued a pork company, JBS, on behalf of a former slaughterhouse worker who died after contracting COVID-19 at work. The plaintiffs asserted that JBS had failed to adequately protect workers from the virus and refused to follow Iowa’s mandatory COVID protocols. JBS asserted that it did not have to follow Iowa’s COVID laws, because they were preempted by the FMIA. JBS argued that because the FMIA already regulates slaughterhouse sanitation, imposing new COVID protocols like social-distancing or masking would be considered “additional or different” requirements than those already in the FMIA. However, the plaintiffs asserted that the FMIA only regulates sanitation issues in relation to food safety, and not the spread of disease between workers, thus, the COVID protocols were not preempted. The court agreed and concluded that because COVID protocols did not fall under the “scope” of the FMIA, the Iowa state law escaped federal preemption, and JBS was mandated to comply with the regulations.

³⁸ Note that preemption and enforcement are dependent upon location. Because the FMIA and HMSA govern the activity within slaughterhouses, federal preemption of a state anti-cruelty statute in a slaughter facility does not render the state law invalid elsewhere (say, on a private family homestead that is not subject to federal inspection or slaughter requirements).

³⁹ See 18 Pa.CSA §5533.

⁴⁰ See Cal. Penal Code § 597.

⁴¹ See N.M. Stat. § 30-18-1.

⁴² 9 CFR § 313.2(a).

B. The PPIA and Federal Preemption (21 USCS § 467e)

Although the FMIA and HMSA exclude poultry,⁴³ an examination of the PPIA affirms that states are not categorically prohibited from enforcing anti-cruelty statutes for acts of abuse committed against the billions of chickens, turkeys, and other birds used in animal agriculture.

The humane handling and slaughter of poultry is largely governed by the good commercial practices (“GCP”) regulation and directives issued under the auspices of the PPIA.⁴⁴ These provisions require that all live birds be handled and slaughtered in accordance with the GCP or risk becoming condemned. The directives also promote “humane methods of handling” poultry to reduce “the likelihood of producing adulterated product” and instruct inspection personnel to monitor for a variety of welfare concerns, including birds being mishandled, mistreated, having their legs broken, or being exposed to extreme weather conditions.⁴⁵

The HMSA and PPIA share “identical express preemption provisions.”⁴⁶ As such, an analysis of federal preemption under the PPIA employs the same two-prong test as the FMIA/HMSA: in order for a state law to be preempted, (1) the state law must fall within the “scope” of the PPIA, and (2) the state law must impose a requirement that is “additional or different” than those already enacted by the PPIA. Accordingly, just as the FMIA/HMSA does not inherently preempt state anti-cruelty statutes, neither does the PPIA. This interpretation is also informed by case law and the FSIS’ own internal documents.

1. Association des Éleveurs de Canards et d'Oies du Québec v. Becerra

In *Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*, a group of foie gras producers asserted that a California state law banning the sale of products made from force-fed birds violated the preemption provision of the PPIA.⁴⁷ The group claimed that a ban on force-feeding birds was not merely a regulation on industry activity, but enforces specific “ingredient requirements.”⁴⁸ Foie gras is the engorged liver of a duck, typically created by force-feeding birds.⁴⁹ By banning force-feeding, the plaintiffs argued that the state law does not simply govern how the animals are treated, but bans an entire ingredient (i.e., the expanded liver).⁵⁰ Because the

⁴³ 21 U.S.C. § 601(c) noting that “cattle, sheep, swine, goats, horses, mules, or other equines on commission” does not include poultry.

⁴⁴ 9 CFR 381.65; Verification of Poultry Good Commercial Practices, FSIS Directive 6110.1 (2018)

⁴⁵ Verification of Poultry Good Commercial Practices, FSIS Directive 6110.1 (2018).

⁴⁶ *Brower v. Campbell Soup Co.*, 243 F. Supp. 3d 1124, 1128 (S.D. Cal. 2017). See 21 U.S.C. § 467e (PPIA); 21 U.S.C. § 678 (FMIA and HMSA).

⁴⁷ *Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140, 1142 (9th Cir. 2017).

⁴⁸ *Id.* at 1146.

⁴⁹ *Id.*

⁵⁰ *Id.*

PPIA has the exclusive ability to set “ingredient requirements” for poultry products, the plaintiffs contended that the force-feeding ban was preempted by federal law.⁵¹ Lastly, the plaintiffs asserted that the PPIA “broadly occupies the field of all edible products that result from raising poultry for food,” and thus, leaves no room for the states to regulate.⁵²

The Ninth Circuit Court of Appeals rejected this argument; holding that an “ingredient” is a physical component of a food product, and not (1) the product itself, or (2) the technique used to make it.⁵³ More importantly, the court stated that the force-feeding ban should be understood as a regulation on animal husbandry practices, on which the PPIA is “silent.”⁵⁴ For this reason, the court found that California’s force-feeding ban was not preempted by the PPIA.⁵⁵ Moreover, as highly relevant here, the court also added that the “PPIA itself contemplates extensive state involvement [and] Congress clearly did not intend to occupy the field of poultry products.”⁵⁶

Thus, the court acknowledged that, as with the FMIA/HMSA, the PPIA also gives states room to implement and enforce their own standards for poultry products—which could reasonably include anti-cruelty statutes. In some ways, the *Éleveurs* decision is an even clearer affirmation of the ability of states to enforce their anti-cruelty laws. While *Harris* dealt with the FMIA and its overt animal welfare requirements as manifested through the HMSA, *Éleveurs* concluded that the PPIA is “silent on the topic of animal husbandry”,⁵⁷ and thus, states have more room to operate in safeguarding the welfare of poultry. In effect, state laws governing poultry welfare likely escape PPIA preemption because as do not fall under the “scope” of the act.

2. FSIS Directives

The FSIS’ own policy documents appear to confirm the agency’s belief that states may enforce their anti-cruelty provisions in matters concerning poultry. For example, in FSIS Directive 6910.1, *District Veterinary Medical Specialist (DVMS) – Work Methods*, while discussing the role of its personnel in cases where poultry are handled inhumanely, the FSIS states that “[t]he [DVMS] . . . may notify State officials of findings that could be a violation of State and local

⁵¹ *Id.* at 1147-1149.

⁵² *Id.* at 1152.

⁵³ *Id.*

⁵⁴ *Id.* (In *Éleveurs*, the Ninth Circuit does not address the Good Commercial Practices found in FSIS Directive 6110.1).

⁵⁵ *Id.* at 1153.

⁵⁶ *Id.* at 1152.

⁵⁷ *Id.* at 1149.

animal welfare codes.”⁵⁸ This reflects the FSIS’ acknowledgement that state anti-cruelty statutes may still apply in the context of poultry slaughtered at federally inspected establishments.

Moreover, in FSIS Directive 6110.1, *Verification of Poultry Good Commercial Practices*, the FSIS states, “In specific situations, after DVMS review of a mistreatment MOI, there may be a need for additional notification of the appropriate state officials.”⁵⁹ The Directive further instructs the DVMS to prepare a LOC to be sent to “the appropriate state official.”⁶⁰ This again manifests the FSIS’ acknowledgement that state officials are not precluded from enforcing anti-cruelty laws at poultry slaughter establishments.

The agency’s own directives: (1) acknowledge that state laws may have been violated because of incidents occurring within a federally inspected poultry slaughterhouse; and (2) instruct its personnel to proactively notify state officials about these potential violations. Accordingly, the FSIS has already taken positions consistent with the requests in this petition. This petition merely asks the FSIS to assert these positions formally, transparently, and proactively via a notice and incorporation into the appropriate directives and communications with state officials, including LOCs.

LOCs are an important example of a type of communication to state officials that FSIS personnel can transmit and that should be revised to clarify the role of local law enforcement. As discussed above, FSIS Directive 6110.1 authorizes DVMSs, after reviewing memoranda of interview that document poultry mistreatment, to notify “appropriate state officials” through an LOC.⁶¹ To our knowledge, however, LOCs have never been sent to state law enforcement or prosecution offices. Nor do LOCs indicate that slaughter establishments and individuals responsible for the mistreatment could be held criminally responsible. For example, LOCs sent in 2020, 2021, and 2023 to Koch Foods of Chattanooga, LLC, in Tennessee, explained that the establishment and its personnel “did not meet the regulatory requirements of 9 CFR § 318.65(b), did not meet the expectations as published in Federal Register Docket #04-037N, and . . . failed to mitigate the deaths of birds by means other than slaughter”⁶² However, the letters did not explain that

⁵⁸ FSIS Directive 6910.1, District Veterinary Medical Specialist (DVMS) – Work Methods, FOOD SAFETY AND INSPECTION SERVICE-UNITED STATES DEPARTMENT OF AGRICULTURE, p.20, https://www.fsis.usda.gov/sites/default/files/media_file/2020-07/6910.1.pdf (last visited July 13, 2023)

⁵⁹ FSIS Directive 6110.1, *Verification of Poultry Good Commercial Practices*, FOOD SAFETY AND INSPECTION SERVICE-UNITED STATES DEPARTMENT OF AGRICULTURE, p.5-6, https://www.fsis.usda.gov/sites/default/files/media_file/2020-07/6910.1.pdf (last visited July 13, 2023)

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Appendix K: Letter from FSIS Jackson District Office to Koch Foods of Chattanooga, LLC, Est. P7487, p. 2 (Dec. 7, 2020); Letter from FSIS Jackson District Office to Koch Foods of Chattanooga, LLC, Est. P7487, p. 2 (July 9, 2021); Letter from FSIS Jackson District Office to Zach Cummings, Plant Manager, Koch Foods of Chattanooga, LLC, Est. P7487, p. 2 (April 17, 2023).

the plant and its employees could also face charges of animal cruelty, and the letters were not transmitted to any law enforcement or prosecution officials. Similarly, LOCs sent to Pilgrim's Pride Corporation in Texas in 2017, Southern Hens in Mississippi in 2020, and Koch Foods of Ashland, LLC, in Alabama in 2020, did not mention criminal liability or notify state enforcement officials.⁶³ Revising these letters to inform slaughter facilities and personnel of potential criminal liability, and sending them to law enforcement and prosecutors to alert them of instances of egregious mistreatment, would help to deter animal cruelty and facilitate appropriate state criminal proceedings when warranted.

Importantly, LOCs must also be written and transmitted far more frequently than they have been historically. We are aware of only 13 LOCs that were issued between 2014 and 2022, an average of a little more than one per year.⁶⁴ During that time, FSIS issued more than 3,300 noncompliance records and memoranda of interview for violations of poultry good commercial practices under the PPIA.⁶⁵ The agency should develop and send an LOC for any such violation that could constitute animal cruelty under the relevant state's law.

V. CONCLUSION

Despite substantial evidence to the contrary, many state officials wrongly believe that the USDA has sole jurisdiction over farmed animal welfare issues and that they are unable to enforce state anti-cruelty provisions. This misperception stems from the pervasive myth that federal statutes like the FMIA, HMSA and PPIA inherently preempt state anti-cruelty laws. Consequently, when concerned parties attempt to pursue enforcement of state anti-cruelty statutes in cases involving farmed animals, they are often met with resistance stemming from the mistaken belief that only the USDA can safeguard the welfare of farmed animals.

The language of the FMIA and PPIA, federal case law, and the FSIS' own internal agency documents all refute this misperception, but this material is not sufficiently accessible or digestible for the average state prosecutor or law enforcement official faced with criminal allegations involving a complex and unfamiliar subject area. To remedy this misperception and encourage state officials to take an active role in protecting the welfare of farmed animals, the FSIS must issue a clear and definitive notice and amend its internal documents to reflect this

⁶³ Appendix L: Letter from FSIS District Manager Jennifer Beasley-McKean to Wesley Smith, Operations Manager, Pilgrim's Pride Corporation, Est. P-206 (July 21, 2017); Letter from FSIS Jackson District Office to Tia Horton, Plant Manager, Southern Hens, Est. P-17766 (March 13, 2020); Letter from FSIS Jackson District Office to Koch Foods of Ashland, LLC, Est. P-1254 (Nov. 9, 2020). Appendix M

⁶⁴ See Appendix M, which contains, to our knowledge, all LOCs transmitted since 2014 in addition to those included in Appendices K and L.

⁶⁵ The figure 3,300 is based on records provided by FSIS to the Animal Welfare Institute in response to Freedom of Information Act requests, and documents posted on FSIS's website.

policy. Animal Partisan requests that the FSIS issue such a notice that plainly conveys the following:

1. State government officials—including law enforcement, prosecutorial, administrative, and others—are not categorically or automatically preempted from enforcing state anti-cruelty laws by the FMIA, HMSA, or PPIA; and
2. FSIS personnel should endeavor to cooperate with state government officials in the enforcement of state anti-cruelty laws, including through commitment to improving the clarity and frequency of communications with state officials, such as LOCs.

In addition to issuing this policy statement, we request that the FSIS amend all relevant directives to incorporate and clearly convey this policy. Lastly, we request that the FSIS ensure that this policy statement is accurately reflected in LOCs sent by the FSIS to state officials.

Through this policy pronouncement, the FSIS can improve the welfare of countless farmed animals in the United States. Moreover, by clarifying the boundaries of its authority and affirming its willingness to work with state enforcement officials, the FSIS can alleviate a recurring point of confusion for local prosecutors and law enforcement officials grappling with allegations of cruelty at agricultural facilities. We urge the FSIS to issue a policy change and stand ready to assist should you require further information or assistance.