UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

NATIONAL MEAT PRODUCERS ASSOCIATION, Appellee,

v.

COMMISSIONER, NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS AND THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS,

Appellants

Appeal From The United States District Court Southern District Of New York

BRIEF FOR THE APPELLANTS

COMMISSIONER, NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS AND THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS

Team 2 Counsel for Appellants

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STATEMENT OF ISSUES PRESENTED

- I. Is the Animal Products Consumer Information Act preempted by the Federal Meat Inspection Act?
- II. Does the Animal Products Consumer Information Act exceed congressional authority under the Commerce Clause of the U.S. Constitution?

STATEMENT OF THE CASE

Appellee, the National Meat Producers Association ("NMPA"), brought suit against Petitioner-Appellants, Commissioner, New York State Department of Agriculture and Markets and The New York State Department of Agriculture and Markets, alleging that the Animal Products Consumer Information Act ("APCIA"), N.Y. Agric. & Mkts. Law § 1000 is unconstitutional. Appellee sought declaratory judgment and injunctive relief. The United States District Court Southern District of New York found that the APCIA was not preempted by the Federal Meat Inspection Act ("FMIA") but that the APCIA violated the Commerce Clause of the United States Constitution. The District Court ruled in favor of Appellee and granted their motion for summary judgment. It is from this decision and judgment that Petitioner appeals to this court.

STATEMENT OF THE FACTS

A. The Heart of America?

Every morning, in farms across America, employees begin the day by rationing out food and water to the hundreds of thousands of farming animals in their facility. These same animals live the rest of their day crammed into confined living quarters with other animals, compelled to fight off animals that are more aggressive. *Appendix B* at 8, 16. They are also forced to live in their own excrement, subjected to harsh climates, transported in rough driving conditions,

handled with violent "cowboy" techniques, dragged by tractors, pulled and thrown by their legs, deprived of proper nesting materials, mutilated without anesthesia, separated from their mothers shortly after birth, stressed to the point of disease and abnormal behaviors, withheld from proper veterinary and basic medical care, and treated as mindless creatures immune to pain up until their time for slaughter. *Id* at 1-21. These "farms" are referred to as "Contained Animal Feeding Operations," ("CAFOs") or "factory farms." *National Meat Producers Asso. v. Commissioner*, CV 11-55440 NCA at 8. All of these animals are being "grown" for their essential function in the American economy, which is to provide the dairy, meat and eggs we consume on our plates. *Id*. A majority of health and nutrition experts have dubbed these products as a major contributor to four of the top seven causes of death in America, including heart disease and cancer. *Id* at 4.

Dr. T. Colin Campbell, the author of the China Study, "directed the most comprehensive study of diet, lifestyle, and disease ever done with humans in the history of biomedical research." *Id* at 4-5. He found that "people who ate the most animal-based food got the most chronic disease. Even relatively small intakes of animal-based food were associated with adverse affects." *Id* at 5. Dr. Campbell testified in a sworn affidavit that "there is nothing better the government could do that would prevent more pain and suffering in this country than telling Americans unequivocally to eat less animal products, less highly-refined plant products, and more whole, plant based foods. It is a message soundly based on the breadth and depth of scientific evidence, and the government could make this clear, as it did with cigarettes." *Id*.

Representatives of the meat industry, however, have worked fervently to prevent the American public from learning of the harmful effects of animal-based products, as well as the abuse and cruelty associated with this industry. *Id* at 17. Many lobbyists have pursued the enactment of "ag-gag" laws, which "prohibit the making of undercover videos, photographs, and

sound recordings at farms. These laws would prevent recorded information about the practices of animal handling through the most effective media – video and photographs." *Id.* To illustrate the immensely influential power of the meat industry, the National Cattlemen's Beef Association compelled the USDA to withdraw a call to its employees to refrain from eating meat on Mondays. *Id* at 17-18.

The Court in *National Meat Asso*. held a different view, stating the American public "has a right to be informed of the nature and substance of the food he or she ingests. Consumers are interested in information regarding the effect of their purchases on their health, the environment, and other living beings." *Id* at 17. The Court added:

Physicians and nutritionists, as well as state and federal health agencies, emphasize the increasing awareness of the importance of a healthy diet by providing the consumer with essential information about how what they eat affects their long-term health. Environmentalists also advocate the dissemination of information on how consumer choices affect the world in which we live. The same is true for animal handling techniques.

Id. The state of New York, while creating ways to reduce long-term government costs, determined it was in the public's interest to educate consumers on the effects of animal-based products, as well as the cruelty associated with them. *Id* at 3.

B. New York State's Efforts at Long-Term Government Cost Reduction Results in Animal Agriculture Awareness

In 2010, New York undertook an effort to reduce long-term government costs without significantly reducing state benefits. *Id* at 3. As a result, the state legislature created The Long-Term Reduction of Government Costs Without Cutting Benefits Committee, which focused mainly on health care and the environment. *Id*. The committee heard over 1,000 hours of testimony, which included opinions from nutrition experts, physicians, public health experts, professors from Cornell University and Colorado State University, experts from the Union of

Concerned Scientists, a representative from the New York Department of Environmental Conservation, and a representative from the Food and Agriculture Organization of the United Nations. *Id* at 3-6, 9-10. The experts discussed the impact of consuming animal products on human health, the impact of animal agriculture on the environment, and the abuse and cruelty associated with farming animals used in food production. *Id* at 4, 8, 11.

The expert from the Union of Concerned Scientists discussed the costs associated with the increased use of, and resistance to, antibiotics in livestock and poultry: bacteria in livestock cause "tens of millions of infections and many thousands of hospitalizations and deaths every year. The costs of *Salmonella* alone have been estimated at about \$2.5 billion per year." *Id* at 6. Dr. Michael Greger, a physician specializing in the effect of intensive animal agriculture on human health, stated that diseases from animals, mostly from farm animals, result in "2.5 billion cases of human illness each year and 2.7 million human deaths worldwide." *Id* at 7.

As a result of intense animal confinement, the American Public Health Association requested a cessation of CAFOs. *Id* at 8. Five years later, the Pew Commission on Industrial Farm Animal Production, made the following conclusion:

Industrialized animal agriculture posed "unacceptable" risks to public health. A key recommendation was the phasing out of extreme confinement practices such as gestation crates, which "induce high levels of stress in the animals and threaten their health," the commissioners wrote, "which in turn may threaten human health."

Id. An expert from the Union of Concerned Scientists testified that CAFOs have imposed significant costs on taxpayers and communities that have yet to be determined, in terms of money and effects on the environment. *Id.* The caveat of CAFOs is the concentration of large numbers of animals in confined spaces, which produces mass quantities of manure that seep into water supplies and kills both aquatic plants and fish. *Id.* "A rough estimate of the total cost of

cleaning up the soil under U.S. hog and dairy CAFOs could approach \$4.1 billion." *Id* at 9. "Animal agriculture is the major contributor of ammonia in the atmosphere, and the substantial majority of this ammonia likely comes from confinement operations." *Id* at 10. Not only do humans suffer from the release of ammonia into the atmosphere, but the animals in the CAFOs develop respiratory diseases as well. *Appendix B* at 8. In addition, CAFOs have a global environmental impact. *National Meat Producers Asso.* at 10-11.

Animal agriculture is the major emitter of all three important greenhouse gases: carbon dioxide (CO2), methane (CH4), and nitrous oxide (N2O). Meat, egg, and milk producers are responsible for an estimated 18%, or nearly one-fifth, of human-induced greenhouse gases. In addition, the experts projected that climate changing impacts of the farm animal sector will be significant for decade to come.

Id. Dr. Bernard Rollin, a Distinguished Professor and Bioethicist at Colorado State

University, a Commissioner on the Pew Commission on Industrial Farm Animal Production, and

Chair of the Global Animal Partnership Board of Directors, testified to his observations in

CAFOs, along with his assessment of the suffering of animals in these operations. Id at 11.

Cattle are branded, castrated, and dehorned without anesthesia, often by inexperienced farm
employees and while the animal is restrained. Appendix B at 1-3. "Over 90 percent of pigs are
raised in some kind of confinement. At the same time, swine are almost universally considered
the most intelligent of farm animals." Id at 4. However, sows are confined in gestation and
farrowing stalls the size of their bodies so inexperienced farm employees can "regulate" their
care. Id at 5. This confinement leads to frustration from the inability to move or conduct natural
behaviors, as well as leads to leg and foot problems that often go untreated. Id at 5-6. Piglets are
painfully castrated without anesthesia, which is often unnecessary since most males go to market
before reaching sexual maturity. Id at 7. Between nine to ten billion chickens are slaughtered
worldwide each year, yet they are intelligent, social creatures. Id at 15. Chickens are forced into

cramped battery cages where there is little room to move, flap their wings, dustbathe, peck, and exercise, and are confined in these conditions for 72 weeks before being shipped to slaughter. *Id* at 16-17. In addition, chickens are often injured and caught in the cages, and experience foot and leg problems that go untreated. *Id* at 20. In general, all of these animals are handled roughly, dragged and thrown by their legs, transported in cramped and uncomfortable climate conditions, mutilated without anesthesia, separated from their mothers too quickly, and left with injuries that go untreated. *Id* at 1-21.

C. The Animal Products Consumer Information Act is Born

As a result of the testimony, the legislature recommended over 20 new regulations for the animal agriculture industry, and passed the Animal Products Consumer Information Act. *Id* at 3. The purpose included educating consumers about purchasing healthy and environmentally friendly products that do not involve animal cruelty, which "would in turn help reduce the long-term health care and environmental costs to the state." *Id*. The Act consists of placing a placard "displayed wherever animal products intended for human consumption are offered for sale" with the following information:

PUBLIC INTEREST WARNING: Many chronic diseases, including heart disease, can largely be prevented and, in many cases, reversed by avoiding the consumption of animal products and eating a whole food, plant based diet. Industrial animal agriculture is also a major source of pollution. Animal handling techniques also lead to animal suffering. The State encourages its citizens to conduct research and make informed choices when purchasing and consuming animal products. For more information, visit www.informedchoice.ny.gov.

N.Y. Agric. & Mkts. Law § 1000.4(1). The website, www.informedchoice.ny.gov, "provides detailed information on the health effects of consuming animal products, and the impact of animal agriculture on the environment and animal suffering... The website also provided a list of farms that New York determined were environmentally sustainable and employed humane

welfare standards. The only farms listed as environmentally sustainable were located within New York." *National Meat Producers Asso.* at 4.

D. Procedural History

On September 15, 2012, the United States District Court for the Southern District of New York granted the Plaintiff's/Appellee's, National Meat Producers Association ("NMPA"), motion for summary judgment. *National Meat Producers Asso.* at 1. The plaintiff had filed

For declaratory judgment and injunctive relief claiming that the Animal Products Consumer Information Act ("APCIA"), N.Y. Agric. & Mkts. Law § 1000, is unconstitutional. NMPA alleges that the placard requirement for meat products violates the Supremacy Clause of the U.S. Constitution by requiring a label that is "in addition to or different than" those specified in the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§ 601-678. The Complaint also alleges that the APCIA discriminates against out-of-state meat processors and imposes an unreasonable burden on interstate commerce in violation of the Commerce Clause.

Id at 1-2. The District Court held that the APCIA did not preempt the FMIA because both acts have different goals and intents, and Congress neither expressly nor impliedly preempted the APCIA. Id at 14. Congress created the FMIA to regulate the quality of meat products and prevent adulterated or improperly labeled meat from entering the food supply. Id. The APCIA, however, is concerned with the effect of animal-based food consumption on the health of Americans, the effect of this industry on the environment, and the negative consequences it has on the animals. Id. The FMIA is not concerned with the goals of the APCIA. Id. In addition, the FMIA is focused on "inspection" and not on regulating the meat industry entirely. Id at 15. The District Court, however, held that the APCIA violated the Commerce Clause of the U.S. Constitution because the website, www.informedchoice.ny.gov, listed only New York farms that were certified as humane. Id at 18-19. The Court believed this would lead consumers to purchase New

York products over out of state goods. *Id* at 19. The APCIA did not meet the "balancing test" illustrated n *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142. *Id* at 20. Although the state's interest in promoting information on the consumption of animal-based products was legitimate, the legislature could have enacted other means that did not impose burdens on interstate commerce. *Id*.

This matter is now on the Defendant's/Appellant's, the Commissioner of the New York State Department of Agriculture and Markets and the New York State Department of Agriculture and Markets, appeal from the judgment entered by the District Court granting the Plaintiff's/Appellee's "motion for summary judgment because the APCIA violates the Commerce Clause of the United States Constitution." *Id* at 21.

SUMMARY OF THE ARGUMENT

Preemption

The Animal Product Consumer Information Act is not preempted by the Federal Meat Inspection Act. The Federal Meat Inspection Act's express preemption clause does not apply to the regulation of information about animal agriculture and animal product consumption that does not accompany a meat product. Congress only intended to preempt state laws that were in addition to or conflicted with federal meat inspection and labeling requirements. In addition, the Animal Products Consumer Information Act's placard requirement does not accompany a product and therefore does not constitute a label. Finally, the Federal Meat Inspection Act is not intended to regulate the entire field of meat commerce nor does the Animal Products Consumer Information Act create an obstacle for Federal Meat Inspection Act compliance.

Commerce Clause

The Animal Products Consumer Information Act does not violate the Commerce Clause of the U.S. Constitution. The Act does not impose an excessive burden on interstate commerce because 1) it protects the legitimate public interest of informing consumers about the health effects of the consuming animal-based products, as well as the cruelty associated with factory farming, 2) the effects are only incidental in that the statute does not require individual labeling of products, so consumers are unable to determine which farms the items were produced, and 3) it has a minimal impact on interstate commerce. The addition or removal of certified farms from the website does not place a lesser burden on interstate commerce because the costs associated with healthcare and environmental cleanup far exceed the amount of business that would shift from out-of-state producers to in-state producers. In addition, the District Court has placed an excessive financial burden on New York state in requiring the legislature to research and analyze out-of-state producers. Moreover, removing the names of the farms defeats the purpose of the statute, which is to educate consumers about certified farms, as is not meant to be an exhaustive list.

STANDARD OF REVIEW

The District Court interpreted that the Animal Products Consumer Information Act was not preempted by the Federal Meat Inspection Act and that the APCIA exceeded congressional authority under the Commerce Clause of the U.S. Constitution. Courts of appeal review de novo a district court's application of federal preemption principles. See *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97. The court reviews a district court's grant of summary judgment de novo. See *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 85. De novo review is review without deference; in reviewing a district court's decision de novo, courts of appeal takes

note of it, and study the reasoning on which it is based. But its review is independent and plenary, and Court of Appeals looks at the matter anew, as though the matter had come to the Court for the first time. *Zervos v. Verizon New York, Inc.*, 252 F.3d 163.

ARGUMENT

- I. The Federal Meat Inspection Act's Express Preemption Clause Does Not Apply To Regulation Of Information About Animal Agriculture And Animal Product Consumption That Does Not Accompany A Meat Product And Therefore The Federal Meat Inspection Act Does Not Preempt The Animal Products Consumer Information Act
 - A. <u>Congress Only Intended To Preempt State Laws That Were In Addition To Or</u>
 <u>Conflicted With Federal Meat Inspection And Labeling Requirements</u>

Preemption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts task is an easy one. Under express preemption Congress explicitly may define the extent to which its enactments preempt state law. *Am. Meat Inst. V. Leeman, 180 Cal. App. 4th 728, 102 Cal. Rptr. 3d 759 (2009).* "The FMIA contains an express preemption clause limiting states in their ability to govern meat inspection and labeling requirements, [it] did not expressly preempt a Texas statute prohibiting the processing, sale, or transfer of horsemeat for human consumption." *79 A.L.R. Fed. 181 (1986).*

To determine Congressional intent, courts look to the language of the preemption statute and the statutory framework surrounding it, as well as the "structure and purpose" of the statute as a whole. *Am. Meat Inst.* The purpose of the FMIA is to protect the public from unadulterated and misbranded meat or meat products intended for human consumption. *See Federal Meat Inspection Act, 21 U.S.C. §§ 601-678.*

The FMIA states "It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are

wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and mate food products [and]...are injurious to the public welfare." 21 U.S.C.A. § 602.

When Congress or a federal agency expressly states its intention to preempt state regulations, the results are usually clear and unambiguous. For example, in 1986 the FDA enacted certain changes in the labeling requirements of aspirin products [and] it also... clearly evidenced its intent to preempt any state-imposed requirements concerning aspirin labeling which conflicted with the FDA requirement. *See Marilyn P. Westerfield*, *Federal Preemption and the FDA: What Does Congress Want? U. Cin. L. Rev. 263*, 265-66, 1989. *See also, Cook Family Foods, Ltd. Voss, 781 F Supp. 1458 (1991)*. (where preemption of state law was expressly provided by the FMIA which prohibits imposition of marking, labeling, packaging, or ingredient requirements in addition to, or different than those made under FMIA. It also required all federally inspected meat products to be weighed and labeled at plant using dry tare procedures, but state regulations required all cured products, including federally inspected cured pork products, be weighed using wet tare procedures; as such making the state law conflict with the federal statute) *79 A.L.R. Fed. 181*.

The FMIA contains an express preemption clause limiting states in their ability to govern meat inspection and labeling requirements. *Id at 181*. The Federal Meat Inspection Act clearly states that labeling requirements in addition to, or different than, those made under this chapter may not be imposed by any state. See National Meat Producers Ass'n at 11. The FMIA defines labeling as "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." *21 U.S.C.* § 601.

B. <u>Animal Products Consumer Information Act's Placard Requirement Does Not Accompany A Product And Therefore Does Not Constitute A Label</u>

The District Court defined accompanying as "any printed material displayed with the intent of conveying information about the product, whether that information is displayed on the product itself, its packaging, or signs, placards, or posters near the product." *National Meat Producers Ass'n. v. Commissioner, CV 11-55440 NCA at 12 (S.D. NY 2010)*.

The Supreme Court interpreted "accompany" as certain material [that] supplements or explains the product and also material designed for use and the distribution and sale of the product. *See A. Bryan Endres, et. al.*, *United States Food Law Update: Health Care Reform, Preemption, Labeling Claims and Unpaid Interns: The Latest Battles in Food Law, 6 J. Food L. & Pol'y 311, 319-20 (2010).* See also *Kordel 335 U.S. at p. 350, 69 S.Ct. 106* (Defines labeling as material that accompanies a product in the sense that it supplements or explains it but is not necessarily physically attached to it.)

1. The Placard Material Is Not Intended To Convey Information About Any Particular Product

The purpose of the APCIA placard requirement is not about the product but about the practice of animal consumption and its effects on the environment caused by animal products including not only meat but also fish, dairy, and eggs. The placard seeks to educate the public on plant based diets and encourages citizens to research when purchasing and consuming animal products. See N.Y. Agric. & Mkts. Law §§ 1000.

The primary purpose of the FMIA is to protect public health and prevent the distribution of any such articles which are adulterated or misbranded. *United States v. Stanko*, 491 F.3d 408, 418 (8th Cir. 2007); 21 U.S.C.A. § 678 (West). This is achieved through many ways including ensuring that labels inform the customer that the products are wholesome and unadulterated. The APCIA placard does not supplement or explain anything regarding the meat or meat food

products that are wholesome and unadulterated. Instead, the APCIA is designed to provide and encourage the dissemination of information about how animal agriculture and the consumption of animal products negatively affects health, the environment, and imposes unnecessary suffering on animals. *See N.Y. Agric. & Mkts. Law* § 10.0

2. The Animal Product Consumer Information Act Bears No Close Textual Relationship With Meat And Meat Products

In *American Meat Institute v. Leeman*, the court found that the point of sale warning was a label within the meaning of the FMIA, because of the close textual relationship with the point of sale warning and the meat and meat products. However, the text of the APCIA placard and the product bears no such relationship. The APCIA required text is as follows:

"PUBLIC INTEREST WARNING: Many chronic diseases, including heart disease, can largely be prevented and, in many cases, reversed by avoiding the consumption of animal products and eating a whole food, plant based diet. Industrial animal agriculture is also a major source of pollution. Some animal handling and confinement techniques also lead to animal suffering. The State encourages its citizens to conduct research and make informed choices when purchasing and consuming animal products."

N.Y. Agric, & Mkts. Law § 1000.4.1

Although New York requires this language to appear wherever animal products (including meat) intended for human consumption are offered for sale, the language bears little relationship to the products. *See Armour & Co. v. Ball, 468 F2d 76(1976)*. (The term labeling has a meaning derived from the purposes of the legislation and inseparable from the history that gave rise to its definition, emphasizing that the intent of the federal legislation was to provide consumers with accurate information. As such, the court found no basis for straining the statutory language of the Federal Wholesome Meat Act, to encompass the factual situation presented by the state notice requirements).

Likewise, the purpose of the FMIA regarding the labeling requirement is to provide the public with accurate information concerning the wholesomeness and unadulterated quality of the

meat and meat products sold. *See also American Meat Institute v. Ball* (Where the court was not convinced that the manifest intention of Congress in enacting the Wholesome Meat Act was to prevent the consumer information that would be provided by state-mandated placards identifying ingredients in certain meat products).

Similarly, the language and history of the FMIA would suggest that Congress did not intend to prevent the information of APCIA; but instead only intended to provide consumer information and protection concerning what type and quality of meat and meat products was available to consumers. *See also Empacadora de carnes de Fresnillo S.A. de C.V. v. Curry, 476 F. 3d 326* (The court held that the FMIA only related to meat inspection and the need for uniform labeling requirements did not extend to what types of meat states permitted to be sold).

C. The Federal Meat Inspection Act Is Not Intended To Regulate The Entire Field Of

Meat Commerce Nor Does Animal Products Consumer Information Act Create

An Obstacle For Federal Meat Inspection Act Compliance

In assessing whether a federal law has preempted state law, courts start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). Implied preemption arises when state law regulates conduct in a field that Congress intended the Federal government to occupy exclusively. *Am. Meat Inst. V. Leeman 180 Cal.* "The FMIA did not preempt the field of meat commerce entirely. *See Empacadora de Carnes de Fresnillo*.

1. The Animal Products Consumer Information Act Does Not Constitute Field Preemption

FMIA did not intend to regulate the entire field of meat commerce, as it asserts that it "shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated

under this chapter." 21 U.S.C. § 678. FMIA did not preempt the field of meat commerce entirely Empacadora de Carnes de Fresnillo, 476 F. 3d. "Even when Congress has not exclusively occupied the field covered by the state law, state law is still pre-empted to the extent it actually conflicts with federal law; such a conflict may arise when it is impossible to comply with both state and federal law or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. Am. Meat Inst. V. Leeman.

a. The Animal Products Consumer Information Act Does Not Constitute Conflict Preemption

The APCIA does not create an obstacle to FMIA compliance. "In analyzing the preemptive effect of various federal laws pertaining to food labeling, the courts have focused on the scope and impact of the particular state statute emphasizing the question whether compliance with both statutes was possible. Thus, under the particular circumstances, it has been held that certain state statutes regulating meat and meat product labeling were pre-empted by the FMIA, whereas other statutes were not so pre-empted." 79 A.L.R. Fed. 181. See also Jones v. Rath Packing Co., 430 U.S. 519, 525-26, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). (Where the court held that Congressional enactments may override state laws which they conflict and where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress). As compliance with both the New York statute and the FMIA is possible, the APCIA must fall under the latter.

The FMIA does not preempt the New York statute which calls for placards discussing the health benefits of a plant based diet and the horrors of animal abuse related to consumption of animal products including poultry and dairy, not just meat. The FMIA regulates the selling of meat to ensure that it is unadulterated and wholesome, it does not mandate consuming animal products. *See Cavel Int'l, Inc. v. Madigan, 500 F.3d 551 (7th Cir. 2007)* (FMIA's preemption

clause did not preempt the Illinois statute making it unlawful to slaughter horses for human consumption since the FMIA only regulated production of horse meat for human consumption; it did not mandate production). The purpose of the FMIA's labeling requirement is to prohibit the sale of meat or meat food products if their labeling is false or misleading in any particular. See 35A Am. Jur. 2d Food § 32. The FMIA regulates the production of meat and meat food products but it does not mandate animal product consumption; if it did, then the APCIA which encourages informing citizens about the negative effects of animal consumption, would conflict with the FMIA and would be preempted.

The court found that one particular California statute pertaining to package weight labels was preemptively invalid since it conflicted with the federal statutory scheme set forth in the Wholesome Meat Act of 1967 by expressly permitting some variances between actual and labeled meat packing weights. See Rath Packing Co. v Becker (1973, CD Cal) 357 F Supp 529. See also Meat Trade Institute, Inc. v McLaughlin (1971, 1st Dept) 37 App Div 2d 456, 326 NYS2d 683 (Court found city regulation requiring certain labeling on meat products was preempted by the Wholesome Meat Act which had its own labeling requirements). Unlike these cases, APCIA does not directly nor indirectly address labeling requirements on or accompanying meat products. See also, Cook Family foods (where the state law was obstacle to execution of federal law and thus preempted).

II. The Animal Products Consumer Information Act Does Not Violate The Commerce Clause Of The U.S. Constitution

A. The Animal Products Consumer Information Act Does Not Impose An Excessive
Burden On Interstate Commerce

The District Court admitted that the APCIA "treats both intrastate and interstate products equally. The information on the placards applies to all animal products sold within New York,

not just those from out of state producers." *National Meat Producers Asso.* at 18. In addition, "the New York law also does not place a burden on out of State producers because the placard is not placed on the product itself." *Id.* The Court's sole concern involved the website, www.informedchoice.ny.gov, which listed only farms in New York certified as humane. It incorrectly concluded that listing farms located only in New York would encourage consumers to purchase in-state products over out-of-state products. This is an erroneous assumption. To sustain its point, the Court utilized the test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137. *Pike* defined the test as such: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects in interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id* at 142.

1. The Animal Products Consumer Information Act Protects A Legitimate Public Interest

The District Court correctly concluded that the intent of the APCIA is for the

legitimate public interest to "protect the citizens of this state by providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively affects health, the environment, and imposes unnecessary suffering on animals." N.Y. Agric. & Mkts. Law § 1000.3. The protection of health and the environment are legitimate state public interests. The protection of animals from cruelty is also a legitimate public interest.

National Meat Producers Asso. at 19. The Court noted that consumers are generally concerned with where their food originates and the process involved in converting food from farm to plate. The Court even went so far as to find that the public has a right to know this information. "It is this Court's conclusion that a consumer has the right to be informed of the nature and substance of the food he or she ingests. Consumers are interested in information regarding the effect of their purchases on their health, the environment, and other living beings."

Id at 17. We agree that dissemination of the information on the placard protects a legitimate public interest in educating consumers about the potential health effects of consuming animal based products and the cruelty associated with the industry. The court in *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, also agreed that

Further, the local interest which the New York scheme was designed to protect is a legitimate one. States have traditionally acted to protect consumers by regulating foods produced and/or marketed within their borders. *E.g.*, *Florida Live & Avocado Growers v. Paul*, 373 U.S. 132, 144.

Grocery Mfrs. of Am., Inc. at 1003.

2. The Effects Of The Animal Products Consumer Information Act Are Only Incidental

If a court finds a legitimate public interest, then a balancing test is applied. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike* at 142. While the District Court found the APCIA unconstitutional per the Commerce Clause simply because the website listed only New York farms, it never truly assessed the question of "degree." It incorrectly assumed that the effects of the APCIA would not be incidental. The effects are incidental. First, certified humane farms were not listed on the placard, which is the information most visible to the consumer. Second, the main purpose of the website is to provide consumers with information about the consumption of animal-based products, which includes the opinions of the experts utilized in the defendant's reply to the plaintiff's motion for summary judgment. The list of farms is only incidental, and as such, will only have an incidental effect on interstate commerce. This is all assuming that the consumer will visit the website, then click on the section regarding certified farms. The Court also missed

one very important point: the APCIA does not require the labeling of individual products, so the consumer has no way of knowing which farm supplied the product. If a consumer goes to the butcher section of the store and asks the butcher to wrap up a t-bone steak out of the display case, the steak will not have a label with the farm that the cow was processed. Hence, the argument that out-of-state producers are discriminated against is void. The listing of certified New York farms on the website has a slight incidental effect in interstate activities because it consists of an insignificant portion of the website and the individual products are not required to list the particular farm that produced the item. It assumes that a significant amount of consumers will find the list of certified farms on the website, then review the labels of products to purchase only items from those farms, which is impossible since the items are not required to be labeled with the name of the farm.

3. The Animal Products Consumer Information Act Has A Minimal Impact On Interstate Activities

The District Court held that "the state could have also enacted other legislation to protect the health of its citizens, farm animals, and the environment which would not have had an impact on interstate commerce." *National Meat Producers Asso.* at 20-21. However, the Court provided no guidance on the type of legislation that would accomplish this goal. The Court also suggested that the website could either add names of farms from other states, or remove the names altogether. It disregarded the state's legitimate concern "that adding additional information on non-New York farms would significantly increase the costs to the New York Department of Agriculture and Markets because the Department would have to gather information on farms from out of state and analyze them under New York environmental and welfare standards." *Id* at 20. This would be counterintuitive to the legislature's goal of reducing government costs. The legislature had every right to be concerned about the increased costs

associated with adding every certified farm in America. Moreover, the Court incorrectly assumes that "the statute itself is advocating the purchase of in state products over the purchase of out of state products." *Id* at 19. This is simply untrue. The website neither expressly nor impliedly directs consumers to purchase only New York products. Instead, it encourages consumers to purchase items from certified humane and environmentally sustainable farms. The list of New York farms is only a starting point for consumers to research certified farms and is not an exhaustive list. Again, the Court is assuming that a majority of consumers will go to the website, find the list of certified farms, then review each product at the store to determine which farm the item was produced, which is impossible since the APCIA does not require individual labeling of products. The list on the website will have only a minimal impact on interstate commerce since the APCIA does not require the individual labeling of products.

The court in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, held that a state regulatory scheme "is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause." *Id* at 474. In this case, the burden on interstate commerce does not outweigh the state's purpose. The few consumers who may wish to purchase items from only certified farms does not compensate for the fact that millions of Americans seek treatment for animal-caused illnesses, or that every day hundreds of thousands of animals suffer in factory farms. The court in *Grocery Mfrs. of Am., Inc.*, agreed with *Minnesota*, holding that the placing of a sign indicating that a cheese is actually an "imitation" was a relatively minor burden on interstate commerce and that it advanced an important state interest.

The New York sign, menu and container provisions do not produce such an inaccurate or misleading result that they fail to serve a legitimate state purpose.

And although complying with the sign posting requirement will certainly not enhance the decor of most restaurants, that negative is not a violation of the Commerce Clause. Indeed, consumers seeking low cholesterol foods may be benefited by the prominence of the signs. The disputed provisions here are the result of legislative choices. The arguments against the provisions "relate[] to the wisdom of the statute, not to its burden on commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128.

Grocery Mfrs. of Am., Inc. at 1005. In summary, the Court has lost focus on the purpose of the APCIA, which is to educate consumers about the health effects of consuming animal-based products, to minimize the cruelty involved, and reduce long-term governmental healthcare and environmental costs. The Court's only concern involved the listing of certified farms on the website, which is an incidental effect and has only a minimal impact on interstate commerce. The Court has disregarded the welfare of humans and animals in its incorrect application of the *Pike* balancing test to the present issue.

B. The Court Places An Excessive Financial Burden On New York State

1. New York State's Interests Are Severely Inhibited By Requiring The Addition Of Non-New York Farms

One goal of the APCIA included reducing the long-term government costs of New York state. The legislature heard over 1,000 hours of expert testimony, then spent additional time creating over 500 recommendations. *Id* at 3. The state was correct in stating that it would incur significant costs in researching and analyzing out-of-state farms. The time and cost would outweigh any effects on interstate commerce, which are minimal as determined above. The website is educating consumers in New York about New York farms because that is where the statute applies. The state is working to save costs while still meeting its goal of educating consumers.

2. Removing Names of Certified Humane Farms Defeats The Purpose of The Statute And Does Not Place A Lesser Burden On Interstate Commerce

The District Court is unfortunately trying to solve a complex issue with a simple answer: not provide any farm names on the website. It has lost sight of the reason for the website's creation, which is to provide information to consumers based on expert opinions. The main purpose is not to direct a consumer to purchase a particular animal-based product in the store based on the farm it derived from. Rather, it is to encourage consumers to research certified farms. Protecting the health of Americans and preventing cruelty, coupled with the potential of saving the state millions of dollars in healthcare and environmental costs, far outweighs the easy request of adding or removing names. The court in *Grocery Mfrs. of Am., Inc.* ruled that health concerns are of great interest to the state.

The very existence of this controversy persuades us that New York's nutritional concerns are not unreasonable. In addition to promoting those concerns, the state requirements are intended to prevent deception and unfair competition, to promote honesty and fair dealing and to permit consumers to clearly discern whether they are buying real cheese or not. We believe that the sign, menu and container provisions effectuate a legitimate, local public purpose.

Id at 1004. In summary, requiring the state to add out-of-state farms to the website imposes a great financial and time burden. Moreover, ordering the state to remove the names adds little value to the Court's assumption that consumers will purchase in-state products over out-of-state products when the APCIA does not require individual labeling of products.

CONCLUSION

For the foregoing reasons, the Appellant Commissioner of the New York State Department of Agriculture and Markets and the New York State Department of Agriculture and Markets respectfully request the Court of Appeals to REVERSE the District Court's grant of the Appellee's motion for summary judgment.