

Case No. CV 11-55440 NCA (ABCx)

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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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.

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ON DIRECT APPELLATE REVIEW FROM THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF OF THE DEFENDANTS-APPELLANTS**

Team Designation #6

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21 U.S.C. §§ 601-678

U.S. Const. art. I, § 8, cl. 3

29 U.S.C. § 1331

28 U.S.C. § 1291

21 U.S.C. § 601(p)

Fed. R. Civ. P. 56(c)

## **JURISDICTION**

The United States District Court for the Southern District of New York had jurisdiction over this case under 29 U.S.C. § 1331. This court has jurisdiction under 28 U.S.C. § 1291. This is a direct appeal from the decision of the District Court granting summary judgment to the Plaintiff-Appellee. Br. Order, September 15, 2012.

## **ISSUES PRESENTED**

- I. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT, N.Y. AGRIC. & MKTS. LAW § 1000, IS NOT PREEMPTED BY THE FEDERAL MEAT INSPECTION ACT, 21 U.S.C. §§ 601-678.**
- II. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT, N.Y. AGRIC. & MKTS. LAW § 1000, EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.**

## **STATEMENT OF THE CASE**

The National Meat Producers Association (“NMPA”) filed suit in the United States District Court for the Southern District of New York seeking declaratory judgment and injunctive relief, claiming that the Animal Products Consumer Information Act (“APCIA”) was unconstitutional. Op. and Order Granting Pl.’s Mot. for Summ. J., R. at 1:19-22, September 15, 2012. In its complaint, the NMPA alleged two issues: first, that the requirement forcing retailers selling animal products to display signage to warn consumers of potential health detriments related to animal consumption violated the Supremacy Clause of the United States Constitution because it required an additional “label” different from those specified in the Federal Meat Inspection Act (“FMIA”), 28 U.S.C. §§ 601-678; and second, that the APCIA violated the Commerce Clause by placing an unreasonable burden on interstate commerce and discriminating against out-of-state producers. Op. and Order Granting Pl.’s Mot. for Summ. J., R. at 2: 1-5.

The NMPA filed a motion for summary judgment under Fed. R. Civ. Pro. 56. Op. and Order Granting Pl.’s Mot. for Summ. J., R. at 2: 23-24. The District Court granted the Appellee’s motion for summary judgment, finding not that APCIA was preempted by the FMIA, but rather that the APCIA violated the Commerce Clause of the U.S. Constitution. Id., R. at 21: 5-7. The Appellants filed notice of appeal to the United States Court of Appeals for the Second Circuit immediately following the District Court judge’s order. Br. Order.

## **STATEMENT OF FACTS**

### **I. LEGISLATION**

To cut state costs without cutting benefits, New York legislature created committees to research potential cost-cutting methods. Op. and Order Granting Pl.’s Mot. for Summ. J., R. at 3: 5-9. One such committee focused primarily on health care and the environment, and, after hearing over 1,000 hours of expert testimony, eventually recommended that the legislature find a way to reduce consumption of animal products, which would subsequently reduce health care and environmental costs to the State of New York. Id., R. at 3: 11-16. Before the farm animal industry could be fully regulated, which would take time, the legislature wanted to educate citizens about the potential health hazards associated with the consumption of animals. Id., R. at 3: 18-21. The goal of the APCIA was 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.

To accomplish its goal of education, the APCIA requires retailers that sell animal products intended for human consumption to display signage stating:

**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. For more information, visit [www.informedchoice.ny.gov](http://www.informedchoice.ny.gov).

N.Y. Agric. & Mkts. Law § 1000.4.1. This sign would only need to be large enough so as to be visible to customers viewing the animal products: it need not be more than two feet long. § 1000.4.2. The URL displayed on the placard directs consumers to a website which provides information on potential health effects of animal product consumption, the various impacts that animal agriculture has on the environment, and animal suffering. Op. and Order Granting Pl.’s Mot. for Summ. J., R. at 4: 1-4. The website also lists farms in New York state that are environmental sustainable and practice humane treatment of animals. Id., R. at 4: 5-8.

The FMIA prohibits any State from enforcing “marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter...” 21 U.S.C. § 678. Labeling under the FMIA is defined 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(p).

## **II. HEALTH ISSUES LINKED TO ANIMAL CONSUMPTION**

The goal of the APCIA is to improve the health of State citizens, thereby lowering the costs of healthcare for individuals and the State of New York. Consumption of animal products increases the likelihood of a person developing heart disease, various cancers, type 2 diabetes, stroke and hypertension. Op. and Order Granting Pl.’s Mot. for Summ. J., R. at 4: 15-17. These diseases rank within the top causes of death in the United States each year. Id., R. at 4: 17-19.

Additionally, animal agriculture, the act of raising and slaughtering animals, is connected with the increasing number of infectious diseases. Id., R. at 4: 19-20.

During the expert testimony phase of the cost-cutting research, the committee heard from multiple experts stressing the need for a change in animal product consumption for both health and economic benefits. Op. and Order Granting Pl.’s Mot. for Summ. J., R. at 3: 11-16. One such expert, Dr. Campbell, testified as to a study he directed analyzing diet, lifestyle and disease. T. Colin Campbell, PhD, Aff. in Supp. of Defs.’ Reply to Pl.’ Mot. for Summ. J. The ultimate findings of the study were that “people who ate the most animal-based food got the most chronic disease...people who ate the most plant-based foods were the healthiest and tended to avoid chronic disease.” Id. When a healthy diet is implemented, chronic diseases such as heart diseases, diabetes and obesity can be reversed, and various cancers and other disorders are greatly influenced by diet. Id. The study concluded that a plant-based diet promotes optimal health in humans. Id.

An expert from the Union of Concerned Scientists (“UCS”) testified to the diseases in humans that originate from livestock. Op. and Order Granting Pl.’s Mot. for Summ. J., R. at 6: 1-3. Antibiotics that are used in Confined Animal Feeding Operations (“CAFOs”), “contributes to the development of antibiotic-resistant pathogens that are more difficult to treat. Expert Aff. in Supp. of Defs.’ Reply to Pl.’ Mot. for Summ. J., R. at 6:4-7. Bacteria that is found on livestock, such as *Salmonella*, *Escherichia coli* and *Campylobacter*, often can cause food-borne diseases in humans: “[t]hese pathogens cause tens of millions of infections and many thousands of hospitalizations and deaths every year.” Id., R. at 6: 8-11. The medical costs associated with treating “*Salmonella* alone have been estimated at about \$2.5 billion per year—about 88 percent of which is related to premature deaths.” Id., R. at 6:12-14.

Dr. Michael Greger, an expert in public health and nutrition, testified about the unprecedented rise in infectious diseases. *Op. and Order Granting Pl.’s Mot. for Summ. J.*, R. at 6: 15-17. Outbreak of infectious disease have risen dramatically in recent decades, “75 percent of which are ‘zoonotic,’ meaning that they come from animals.” Michael Greger, MD, *Aff. in Supp. of Defs.’ Reply to Pl.’ Mot. for Summ. J.*, R. at 7: 1-5. Dr. Greger stated that there are roughly 2.5 billion cases of human illness caused by zoonotic diseases each year, and 2.7 deaths worldwide caused by zoonotic diseases. *Id.* With the dramatic increases in human illness and death linked to diseases from animal consumption, it is imperative that consumers are informed about the risks associated with consumption.

### **III. ENVIRONMENTAL ISSUES LINKED TO ANIMAL AGRICULTURE**

The committee also heard from four experts who testified about the devastating impact of animal agricultural on the environment. *Expert Aff. in Supp. of Defs.’ Reply to Pl.’ Mot. for Summ. J.*, R. at 8: 11-12. All four experts concluded that factory farming has a negative effect on the environment. *Id.*, R. at 8: 13-15. A UCS expert testified about the significant costs on taxpayers and communities due to large CAFOs. *Id.* The expert explained the confined conditions that animals in CAFOs are subjected to, resulting in costly problems related to the disposal of manure and overuse of antibiotics to prevent disease. *Id.*, R. at 8: 22-24. Additionally, the expert explained how issues related to manure disposal have contaminated drinking water in many rural areas, caused increased levels of ammonia, and killed millions of fish. *Expert Aff.*, R. at 9: 2-5. Lastly, the expert discussed specific figures attributed to these issues, including a projected \$56 million cost to taxpayers in New York to help remedy the issue. *Id.*, R. at 9: 6-18.

A representative of the New York Department of Environmental Conservation also testified before the committee. 9 at 19-20. He testified about the specific levels of nutrients and eutrophication as impaired in New York's water bodies. 9 at 21-23, 10 at 1. He noted that such elements are "major contributing sources of impact." 10 at 1.

An additional expert from the UCS testified about the air pollution caused by manure. 10 at 2-4. The expert categorized airborne ammonia as a respiratory irritant that can cause disease. *Id.* at 10. The expert also explained the process by which it can make its way into water sources. *Id.* at 5-8. Lastly, the expert classified animal agriculture as the major contributor of ammonia to the atmosphere, and opined the potential effects to forests and the environment. *Id.* at 9-14.

The final expert that testified was from the Food and Agriculture Organization of the United Nations. 10 at 15-16. The expert explained how animal agriculture is a major emitter of three important greenhouse gases. 10 at 15-18, 11 at 1. Meat, egg, and milk production are responsible for nearly one-fifth of human-induced greenhouse gases, the expert added, and projected that the farm animal sector will continue to have such impacts "for decades to come." 11 at 1-4.

#### **IV. THE UNNECESSARY SUFFERING OF ANIMALS**

Dr. Bernard Rollin testified as to the suffering endured by animals within the agricultural industry, and he provided a comprehensive affidavit with common practices in the industry and their effect on animals. *Op. and Order Granting Pl.'s Mot. for Summ. J., R.* at 11: 5-8. He explained many of the diseases and other negatives associated with the industry: for example, he not every animal can be checked in the broiler industry, resulting in weak and injured animals going undetected and potentially trampled. *Id.*, *R.* at 20: 18-19. Additionally, he also explained

how poor cattle handling can lead to significant pain and injury, leading to animal suffering and distress. Id., R. at 20: 13-14.

## **STANDARD OF REVIEW**

Courts review a summary judgment decision *de novo*, applying the same legal standard for summary judgment as used by the district court. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The court views that findings of fact and evidence in the light most favorable to the nonmoving party, in this case the Appellants. Id. at 248. Summary judgment is proper only when “there is no genuine issue as to any material fact...” Fed. R. Civ. P. 56(c). Factual disputes that are material under the substantive law will defeat a motion for summary judgment. Anderson, 477 U.S. at 247-48.

## **SUMMARY OF THE ARGUMENT**

### **I. PREEMPTION**

Congress defined “labeling” under the FMIA 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(p). The APCIA does not require for placards to be placed on the actual meat, its containers, or wrappers. See generally N.Y. Agric. & Mkts. Law § 1000.4 (outlining the placard and menu requirements). In short, the APCIA’s placard requirement does not usurp the role reserved for meat labeling, it merely complements it with consumer information pertaining to their health, the environment, and animals. A comprehensive review of the FMIA’s actual language and its definition of “labeling” reveals that the APCIA’s placard requirement is not “labeling” within the meaning of the FMIA.

**II. THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT DOES NOT VIOLATE THE COMMERCE CLAUSE BECAUSE IT PROMOTES A LEGITIMATE STATE INTEREST AND DOES NOT BURDEN INTERSTATE COMMERCE.**

The APCIA does not violate the Commerce Clause because it promotes the legitimate state interest of informing consumers about health risks associated with the consumption of animal products and does not burden interstate commerce. Where a state statute regulates an area to “effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to local putative benefits.” Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

The State of New York has a legitimate interest in promoting the health and welfare of its citizens, including the health risks associated with the consumption of animal products, the negative environmental impact of animal agriculture, and the prevention of cruelty to animals. The APCIA further promotes these interests.

The APCIA does not burden interstate commerce. The APCIA does not discriminate against out-of-state meat producers because it applies equally to both out-of-state producers and in-state producers.

**ARGUMENT**

**I. PREEMPTION**

**A. THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT DOES NOT CONSTITUTE “LABELING” WITHIN THE MEANING OF THE FMIA BASED ON CONGRESS’ INTENT**

The FMIA expressly states that “[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . .” 21 U.S.C. § 678. At issue during the district court proceeding, inter alia, was

whether the APCIA’s placard requirement constitutes “labeling” within the meaning of the FMIA. The meaning of the term “labeling” is best determined by reviewing a) the actual language of the FMIA and b) the definition assigned by Congress. See Am. Meat Inst. v. Ball, 424 F. Supp. 758, 763 (D. Mich. 1976).

Firstly, the actual language of the FMIA refers to labeling throughout multiple sections. Its Congressional statement of findings emphasizes the importance of protecting the health and welfare of consumers by assuring that meat products distributed to them are “wholesome, not adulterated, and properly marked, labeled, and packaged.” 21 U.S.C. § 602. Other sections require meat inspectors at covered establishments to label meat for human consumption as either “[i]nspected and passed” or “[i]nspected and condemned,” and its storage containers must be labeled accordingly. 21 U.S.C. §§ 604, 606-607(a), 608. An additional section empowers the Secretary to monitor and enforce “the styles and sizes of . . . labeling to avoid false or misleading labeling in marketing . . . .” 21 U.S.C. § 607(c)(e).<sup>1</sup> Lastly, a section prohibits the modification of labeling in light of the statute’s purpose of preventing the distribution of meat which is adulterated or misbranded. See 21 U.S.C. § 678.

In short, the actual language of the FMIA reveals that Congress’ “primary intent . . . is to regulate what producers say about their products” in order to protect the public. See Am. Meat Inst. V. Ball, 424 F. Supp. at 762. See also G. A. Portello & Co. v. Butz, 345 F. Supp. 1204, 1207-08 (1972) (finding that the policy of the FMIA is “above all to protect the health and welfare of consumers). Virtually every section within the statute that refers to labeling promotes the health and welfare of consumers through regulating deceptive labeling practices by meat establishments. Moreover, there is a subchapter within the FMIA titled “Inspection

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<sup>1</sup> “The term ‘Secretary’ means the Secretary of Agriculture of the United States or his delegate.” 21 U.S.C. § 601(a).

Requirements; **Adulteration and Misbranding**” (emphasis added). See generally 21 U.S.C. Subchapter I.

Secondly, Congress defined “labeling” under the FMIA 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(p). The APCIA does not require for placards to be placed on the actual meat, its containers, or wrappers. See generally N.Y. Agric. & Mkts. Law § 1000.4 (outlining the placard and menu requirements). Accordingly, the issue turns to whether the APCIA’s placard requirement constitutes labeling “accompanying” meat items.

In 1948, the Supreme Court interpreted the meaning of “accompanying such article” as it applied to a federal law analogous to the FMIA. See Kordel v. United States, 335 U.S. 345, 346-48 (1948). The defendant was charged with misbranding drugs by distributing misleading pamphlets that were not on the actual product. Id. at 346-47. The Court held that the pamphlets were labels “accompanying” the product because it supplemented or explained the product. Id. at 349-50. The pamphlets were “an essential supplement” to the product label because it was the only literature explaining the use of the product. Id. at 348 (reasoning the products and the literature were interdependent). Two recent court rulings rely on Kordel in finding that in-store materials are “labeling” within the meaning of the FMIA. See Am. Meat Inst. v. Leeman, 180 Cal. App. 4th 728, 735 (2009) (holding that point of sale warning requirements with respect to meat was labeling preempted by FMIA); Meaunrit v. ConAgra Foods Inc., 2010 WL 2867393, \*8 (N.D. Cal. 2010) (holding that an in-store sign was a label for purposes of federal preemption by the FMIA).

Unlike Kordel, the APCIA’s placard requirement does not explain the use of the product. Instead, its purpose is to protect the state’s citizens by informing them how animal agriculture

and the consumption of animal products negatively affects their health, the environment, and animals. See N.Y. Agric. & Mkts. Law § 1000.3. Placards are restricted to explaining this sole purpose and make no attempt at listing use of product information, such as cooking instructions, or other required information, such as ingredient listings. In short, the APCIA's placard requirement does not usurp the role reserved for meat labeling, it merely complements it with consumer information pertaining to their health, the environment, and animals.

More analogous to the facts in this case is Am. Meat Inst. v. Ball, where the state of Michigan enacted a law providing consumers with information on higher standards for meat products. See 424 F. Supp. at 760, 769. More specifically, the state required higher meat ingredient standards than the FMIA, and retailers not meeting this standard were required to post a notice informing consumers as such. Id. at 763. The court held that the notice requirement was not "labeling" based on the literal terms of the statutory definition and Congress' intent, which employed the term "accompany" to protect consumers and to curb misleading information provided by regulated meat producers and sellers. Id. at 766. See also Gershengorin v. Vienna Beef, Ltd., 2007 WL 2840476, \*3 (N.D. Ill. 2007) (holding FMIA does not preempt regulation of signage separate from labeling on actual meat packaging). It is irrelevant that the court's analysis was based on its interpretation of the term "labeling" under a different federal statute because the FMIA adopted its labeling definition verbatim from this federal statute. Am. Meat Inst. v. Ball, 424 F. Supp. at 762.

Accordingly, a comprehensive review of the FMIA's actual language and its definition of "labeling" reveals that the APCIA's placard requirement is not "labeling" within the meaning of the FMIA. The plain meaning of the FMIA sections referring to labeling practices indicate that Congress was concerned with promoting the welfare of consumers through regulation of

deceptive labeling practices by meat establishments. Case law interpreting the definition of “labeling” furthers this same Congressional intent. The APCIA’s placard requirement poses no risk of deceptive labeling because all retailers are required to post the same literature, and in the same format. See § 1000.4. As a result, Congress’ rationale for regulating meat labeling is inapplicable, and the APCIA does nothing more than provide consumers with pertinent information. See Am. Meat Inst. v. Ball, 424 F. Supp. at 766 (finding states not prohibited from communicating information to citizen-consumers to help them make informed purchasing decisions).

**B. Even if the Animal Products Consumer Information Act does constitute as “labeling,” it is not expressly preempted by the fmia based on its plain language and not impliedly preempted based on congress’ intent, and any doubts should be resolved in favor of public policy.**

The Supremacy Clause provides that the “Constitution[] and the laws of the United States . . . shall be the supreme law of the land . . . .” Const. Art. VI. cl. 2. State law that conflicts with federal law is “without effect” and thereby preempted. See Maryland v. Louisiana, 451 U.S. 725, 746 (1981). A federal law may expressly preempt a state law. See Hillsborough Cnty. v. Automated Med. Lab., Inc., 471 U.S. 707, 713 (1985). In the absence of express language, preemption may be implied based on Congress’ intent. See id. In analyzing both express and implied preemption, “[t]he purpose of Congress is the ultimate touchstone.” Malone v. White Motor Corp., 435 U.S. 497, 504 (1978). See also Cal. Fed. Sav. & Loan v. Guerra, 479 U.S. 272, 280 (1987) (acknowledging that sole task in addressing preemption claims is to “ascertain the intent of Congress”).

Additionally, a preemption analysis begins “with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

This assumption particularly applies when Congress has legislated in a field traditionally occupied by the States. Medtronic Inc. v. Lohr, 518 U.S. 470, 485 (1996). Accordingly, when the text of a state’s preemption clause is susceptible to more than one interpretation, courts ordinarily “accept the reading that disfavors pre-emption.” Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005).

**1. The Animal Products Consumer Information Act is not expressly preempted by the FMIA based on a plain language reading of the statute.**

Courts review express preemption claims in light of Congress’ intent. See Cal. Fed. Sav. & Loan, 479 U.S. at 280. The FMIA’s express preemption provision states that its “[r]equirements . . . with respect to premises, facilities and operations of any establishment at which inspection is provided . . . which are in addition to, or different than those made under . . . [the FMIA] . . . may not be imposed by any State.” 21 U.S.C. § 678. The FMIA further states that “[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . .” Id. The preemption provision also includes a saving clause, which states that it “shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this [law], with respect to any other matters regulated under this [law].” Id. In short, states may regulate “other matters” not addressed in the FMIA’s express preemption clause, as long as those laws are “consistent with” the FMIA. Id.

The Supreme Court just recently considered the issue of express preemption as it applies to the FMIA. See Nat’l Meat Ass’n v. Harris, 132 S. Ct. 965, 970-71 (2012). In Harris, the California legislature strengthened a pre-existing statute governing the treatment of nonambulatory animals and applied it to slaughterhouses regulated under the FMIA. Id. at 969-70. After reviewing the relevant provisions of the FMIA, the Court determined that the FMIA

regulates slaughterhouses' handling and treatment of nonambulatory pigs from the moment of their delivery through the end of the meat production process. Id. at 975. In holding that California's law was expressly preempted, the Court observed that California's law "endeavors to regulate the same thing [as the FMIA], at the same time, in the same place—except by imposing different requirements." Id.

Unlike Harris, the APCIA's placard requirement does not attempt to regulate an area expressly regulated by the FMIA, such as the treatment of animals at slaughterhouses. Instead, the APCIA seeks to inform the state's citizens about how animal agriculture and the consumption of animal products negatively affects their health, the environment, and animals. See § 1000.3.

On the other hand, Congress' intent in drafting the FMIA was to directly regulate the activities of meat producers and distributors, including the treatment of animals and the proper labeling of meat products. Nowhere in the FMIA's express language does it expressly prevent the dissemination of consumer information that the APCIA seeks to accomplish. Moreover, the APCIA is "consistent with" the FMIA, as both laws protect the health and welfare of consumers, albeit through alternate means. Accordingly, the APCIA's placard requirement is not expressly preempted by the FMIA. See 21 U.S.C. § 678 (permitting states to regulate "other matters" not expressly preempted by the FMIA so long as consistent).

## **2. The Animal Products Consumer Information Act is not impliedly preempted by the FMIA based on Congress' intent.**

Courts review implied preemption claims in light of Congress' intent. See Cal. Fed. Sav. & Loan, 479 U.S. at 280. The two forms of implied preemption are field preemption and conflict preemption. See Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992). Field preemption applies where the scheme of a federal law is so pervasive as to reasonably infer that

Congress left no room for the States to supplement it. Id. Conversely, conflict preemption applies where compliance with both a federal and state law is a physical impossibility, or where a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Id.

Firstly, the plain language of the FMIA indicates that Congress did not intend to preempt the entire field of meat regulation. The FMIA's preemption saving clause states that it "shall not preclude any State ... from making requirements or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." 21 U.S.C. § 678. While the provision restricts the "matters" that states may regulate and requires its actions to be "consistent," it nonetheless permits State involvement if these conditions are met. See Swift & Co. v. Walkley, S.D.N.Y.1973, 369 F.Supp. 1198 (permitting state to alter meat product label although federal government had approved labeling).

Even more indicative of Congress' intent to not preempt this field was its enactment of an entire subchapter titled "Federal and State Cooperation." See 21 U.S.C. Subchapter III. It expressly states that "the policy of . . . Congress [is] to protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in efforts by State and other Government agencies to accomplish this objective." 21 U.S.C. § 661(a). The rest of the section outlines the logistical aspect of implementing this policy, including guidelines on "developing and administering a State meat inspection program." Id. at (a)(1). In sum, the FMIA's plain language not only does not preempt the entire field of meat regulation, it actually depends on the cooperation of the states. Accordingly, New York's enactment of a law that merely provides consumers with information cannot be deemed preempted.

Secondly, the FMIA does not preempt the APCIA via a form of conflict preemption. Where the FMIA's goal is to regulate meat producers and distributors, the APCIA seeks to supply consumers with additional information pertaining to meat products. Compliance with both laws is not a "physical impossibility" because neither law impedes with the other. Contrast Grocery Mfrs. of America, Inc. v. Gerace, 766 F.2d 993, 993-94 (2nd Cir. 1985) (preempting state law that made it impossible to comply with labeling aspect of federal law). For example, a retailer's posting of a placard has no effect on the ability of federal employees to perform audits at slaughter facilities or to regulate labeling ingredients. As a matter of fact, the duties of such employees remain exactly the same whether or not they are aware of the APCIA's applicability. Likewise, retailers in New York can comply with the APCIA's notice requirement notwithstanding the federal government's ability to comply with the FMIA's guidelines.

Similarly, the APCIA does not obstruct the accomplishment and execution of the purposes and objectives envisioned by Congress in enacting the FMIA. Contrast Jones v. Rath Packing Co., 430 U.S. 519, 519 (1977) (preempting a state law that called for different weight-labeling standards than federal law). The purpose of the FMIA is to protect the health and welfare of consumers, and it accomplishes this objective by regulating meat producers and distributors. As noted above, federal employees are able to perform such regulating duties regardless of the placard requirement. The APCIA's purpose is similar to the FMIA's in that it seeks to promote the health of consumers, but does so by informing them of potential risks. Accordingly, there are no conflict preemption issues between the FMIA and APCIA.

**3. Any doubts as to the constitutionality of the Animal Products Consumer Information Act should be resolved in favor of public policy.**

Any conflicts as to whether the FMIA preempts the APCIA should be resolved in favor of public policy. The APCIA seeks to protect the state's citizens by informing them how animal

agriculture and the consumption of animal products negatively affects their health, the environment, and animals. See § 1000.3. Before passing the legislation, the New York legislature held numerous committee hearings and heard from various experts in the field. Three experts testified in the area of health affects linked to consumption of animal products, and all of them discussed potential diseases or infections that may be caused by such consumption. Additionally, four experts testified as to impact of animal agriculture on the environment, and effects like water pollution and airborne ammonia were cited. Lastly, an expert testified as to the suffering endured by animals within the agricultural industry, and he provided a comprehensive affidavit with common practices in the industry and their affect on animals.

While the legislature may have been prompted to enact the APCIA for cost reduction reasons, its main application remains the same as the FMIA's: to protect the health of consumers. The placard requirement accomplishes this purpose by providing consumers with warnings about the negative effects associated to meat consumption and purchasing. The placard does not necessarily discourage consumers from consuming or purchasing meat products, but attempts to educate them—including by referencing a state website where consumers can obtain more information—so they can make their own informed purchasing choice. In light of the testimony provided during the committee hearings, coupled with the lack of evidence rebutting such testimony, public policy dictates that the placard requirement not be preempted by the FMIA.

**II. THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT DOES NOT VIOLATE THE COMMERCE CLAUSE BECAUSE IT PROMOTES A LEGITIMATE STATE INTEREST AND DOES NOT BURDEN INTERSTATE COMMERCE.**

The APCIA does not violate the Commerce Clause as it does not burden interstate commerce.

The Commerce Clause states that “Congress shall have power to...regulate commerce...among the several states...” U.S. Const. art. I, § 8, cl. 3. The Commerce Clause also has a negative component, the dormant Commerce Clause, which is the regulatory effect of the Commerce Clause on state activity affecting interstate commerce where Congress itself has not yet acted to control the activity. Oklahoma Tax Com’n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995).

The purpose of the Commerce Clause is to prevent any one State from economically isolating itself, thereby “jeopardizing the welfare of the Nation as a whole.” Id. at 180. Where a state statute regulates an area to “effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to local putative benefits.” Pike, 397 U.S. at 142 (1970), citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960). A court can consider the nature of the local interest involved when evaluating the degree of the burden, as well as whether there are any other lesser means by which it could be promoted. Pike, 397 U.S. at 142. The APCIA serves a legitimate state interest and does not violate the Commerce Clause because it does not burden interstate commerce or discriminate against out-of-state meat producers.

**A. The State of New York has a legitimate interest in disseminating information to its citizens to promote their health and welfare.**

New York has a legitimate interest in promoting the health of its citizens. The health and welfare of its citizens has long been a legitimate State interest, and one protected by the State’s

ability to regulate. The negative environmental impact of animal agriculture is a legitimate state interest. The prevention of cruelty to animals and the humane treatment of them is a subject of general public concern: a legitimate interest. Safarets, Inc. v. Gannett Co., 80 Misc.2d 109 (1974). See also McGill v. Parker, 582 N.Y.S.2d 91, 106-107 (1992) (holding that the treatment of carriage horses, including housing conditions, food and medical treatment, is a matter of public concern and controversy in New York).

In Safarets, the plaintiffs, owners of a pet store, filed an action against a newspaper company on the ground that an article published was libelous as to the conditions in which the plaintiffs kept their animals. Safarets, 80 Misc.2d at 110. Following precedent, the court held that where a public interest is involved, publication of such subject is permissible where the author had a good-faith basis for believing the allegations to be true. Id. at 112. The court ruled that an article dealing with the humane treatment of animals and birds, specifically the prevention of cruelty to those animals, involves a subject of general public concern or interest. Id. at 113. The court similarly ruled in McGill, where the issue involved public statements made regarding the inhumane treatment and housing of carriage horses. 582 N.Y.S.2d at 93. The court ruled that the treatment of animals, specifically horses in the carriage industry, had long been a matter of public concern and interest in the State of New York. Id. at 96.

As previously noted, the APCIA was enacted 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 district court concluded that a New York consumer has the absolute right to be informed as to the nature and substance of any food he or she consumes. Op. and Order Granting Pl.’s Mot. for Summ. J., R.

at 17: 5-6. Consumers have an interest in knowing “the effect of their purchases on their *health*, the *environment*, and *other living beings*. *Id.*, R. at 17:6-7 (emphasis added).

The State of New York has a legitimate interest in educating its citizens about health detriments associated with animal consumption, the negative environmental impact that animal agriculture can have on the State, and the necessity for humane treatment of livestock animals. This legitimate interest is promulgated by the APCIA statute, and helps to direct the citizens of New York to pursue a plant-based diet or, at the very least, consume animal products from known, humane-certified vendors.

**B. The effects on interstate commerce are only incidental and the burden imposed on such commerce is not excessive in relation to local benefits.**

Where a legitimate state interest is found, the question of whether there is a burden on commerce evaluates the degree to which that burden exists. *Pike*, 397 U.S. at 142. Courts find a state regulation unconstitutional only when it unjustifiably and facially discriminates against out-of-state establishments. *Am. Trucking Ass’n, Inc. v. Michigan Pub. Serv. Comm’n*, 545 U.S. 429, 434 (2005), *citing Philadelphia v. New Jersey*, 437 U.S. 617 (1978). A state regulation is valid if it is applied to an activity with a “substantial nexus with the State, is fairly apportioned, does not discriminate against interstate commerce, and it is fairly related to the services provided by the State.” *Jefferson Lines*, 514 U.S. at 175. A state may not impose regulations that will discriminate against interstate business while offering commercial advantages to in-state, local entities. *Am. Trucking Ass’n*, 545 U.S. at 433, *citing Oregon Wate Sys, Inc. v. Dep’t of Env’tl. Quality of Ore*, 511 U.S. 93, 99-100 (1994). As long as the state action does not discriminate against interstate commerce, the burden on interstate commerce is permissible where it is an inseparable incident of the exercise of legislative authority. *See South Carolina State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177 (1938).

The plaintiff challenging the constitutionality of a regulatory statute, in this case the Appellee, has the burden of proving that the statute is discriminatory. Oltra, Inc. v. Pataki, 273 F.Supp.2d 265, 272 (W.D. N.Y. 2003), citing Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 209 (2d Cir. 2003). In the case of evaluation a motion for summary judgment, a court must evaluate the facts presented in the light most favorable to the nonmoving party, in this case the Appellants, that there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). The Appellee has not sufficiently demonstrated that the statute burdens interstate sufficiently to such a degree as to outweigh the local benefits, a material issue of fact that should be submitted to a fact finder, be it a judge or jury.

**1. The Animal Products Consumer Information Act does not discriminate against out-of-state meat processors.**

The APCIA does not discriminate against out-of-state meat producers because it applies equally to both out-of-state producers and in-state producers. Where a statute does not distinguish is applicability between out-of-state entities and intrastate entities, that statute is not facially invalid. Oltra, 273 F.Supp.2d at 272. Once a statute is determined to be facially neutral, the next question is whether or not the statute “unambiguously discriminates in its effect.” Id., quoting Brown & Williamson, 320 F.3d at 209. States may not enact regulations that discriminate against foreign business which compete against local business, “and from discriminating against commercial activity occurring outside the...State.” Jefferson Lines, 514 U.S. at 197.

In Jefferson, the court rejected the argument that Oklahoma discriminated against out-of-state travel when it taxed a full-priced bus ticket in the state, even though the bus had interstate travel involved. Id. at 198. The court ruled that because the tax did not distinguish between buses traveling interstate or intrastate, the tax regulation was not discriminatory on its face. Id.

Additionally, in Am. Trucking, the court ruled that the statute imposing a 100 dollar annual flat fee to trucks engaging in intrastate commerce did not discriminate against interstate commerce, even where the trucks originated out-of-state. 545 U.S. at 434. Since the fee only involves activity happening within the state's borders, and the fee is required from trucks originating within Michigan as well, the regulation was ruled to be non-discriminatory in nature to interstate commerce. Id.

The district court held that the APCIA does not itself violate the dormant Commerce Clause, as it does not discriminate against out of state producers, but rather applies to both intrastate and interstate animal products. Op. and Order Granting Pl.'s Mot. for Summ. J., R. at 18: 17-19. The district court did not err in making this finding. As in Jefferson, the APCIA "does not place a burden on out of State producers because the placard is not placed on the product itself." Op. and Order Granting Pl.'s Mot. for Summ. J., R. at 18: 22-24. It instead places the burden on the New York retailer who is required to display the placard near the animal products. Id., R. at 18: 22-24. The out-of-state meat producers are *not* required to change anything about their production or shipping methods. The out-of-state meat producers experience no detriment as a result of the APCIA, and are in no way prohibited from selling their animal products to New York retailers.

The Appellee has failed to show that the APCIA is discriminatory in nature against out-of-state entities. The heaviest burden in fact falls upon the New York state retailers where the retailers are required to display placards indicating the negative health affects of all meat consumption, not just meat imported from other states.

**2. The Animal Products Consumer Information Act does not burden interstate commerce in violation of the commerce clause and seeking alternative methods of disseminating health-related information to its citizens would be unduly burdensome to the State of New York.**

There are no alternative means available to the State of New York by which it could lessen any impact to out-of-state entities while still implementing the state interest of healthy food consumption. The state bears the burden of justifying the statute in terms of both the local benefits it has as well as unavailability of nondiscriminatory alternatives which would still preserve the local state interests. Oltra, 273 F.Supp.2d at 272, quoting Brown & Williamson, 320 F.3d at 209. A statute will be upheld where the burden on interstate commerce is outweighed by the local benefits of the statute. Pike, 397 U.S. at 142. Where the produced goods are contaminated or otherwise unfit, such produce is “not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution.” Id. at 143-44, quoting Sligh v. Kirkwood, 237 U.S. 52, 60 (1915).

In Pike, a statute was enacted which prohibited companies from shipping cantaloupes out of the State of Arizona without first packed in containers. 397 U.S. at 139. The typical practice for a company was to ship the cantaloupes to a packing plant in California, where they would then be packaged and shipped to retailers. Id. The court ruled that requiring Arizona cantaloupe growers to build packing plants so that they might pack the cantaloupes prior to sending them to the shipping plant in California was unduly burdensome and would cost in excess of hundreds of thousands of dollars. Id. at 145.

The type of information available on the placard, as designated by the APCIA, does not contain all possible information about the consumer’s health, the environment, and the human treatment of animals. Op. and Order Granting Pl.’s Mot. for Summ. J., R. at 17: 9-10. Rather, the placard directs consumer to conduct research and visit the website associated with the

APCIA. The district court erred when it concluded that the New York sponsored website was designed to promote products produced in the State of New York over products produced in other states. .” Op. and Order Granting Pl.’s Mot. for Summ. J., R. at 19: 1-5.

Although it may elect to do so, the State of New York may not be compelled to list all potential farms from where animal products are imported from. Unlike in Pike, where there was a substantial burden imposed on cantaloupe growers by requiring them to build packing plants, no requirements are made of any out-of-state meat producers: all animal products intended for consumption will still be accepted into the State of New York. However, as stated in Pike, the Commerce Clause does not apply to produced goods that are contaminated or otherwise unfit. 397 U.S. at 143-44. Therefore, any farms or animal products producers that do not employ sanitary and humane conditions are not subject to the protection of the Commerce Clause as their products are tainted and unhealthy for consumption. It would be unduly burdensome for the State of New York, particulate the Department of Agriculture and Market, to travel to other states nationwide, conduct surveys of the farm activity and conclude that the farms follow the same codes as the farms listed on the website as environmentally sustainable and humane. There is no substantial burden on out-of-state producers by not being listed on the website; however, the burden on the State of New York would be substantial if required to research and list all environmentally sustainable farms on its website.

The Appellants should be granted the opportunity to introduce evidence demonstrating that the APCIA does not discriminate against out-of-state producers and that there are no alternative means available to educates its citizens about the health detriments to consuming animal products, particularly those animal products that are not prepared to the utmost healthful

standards. There is no direct burden imposed on interstate commerce, and any potential incidental burden is significantly outweighed by the putative local benefits of the APCIA.

### CONCLUSION

For the foregoing reasons, the Appellants respectfully request that this Honorable Court reverse the decision granting the Appellee's motion for summary judgment, and remand this case to the District Court for the Southern District of New York for further proceedings, because there are genuine issues of material fact as to whether the Animal Products Consumer Information Act exceeds Congressional authority.

Respectfully submitted  
For the Defendants-Appellants,  
Commissioner, New York State  
Department of Agriculture and  
Markets and the New York State  
Department of Agriculture and  
Markets,

*Team #6*

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Team Designation # 6

JANUARY 2012

**Certification Pursuant to NALC Moot Court Rules**

We hereby certify that our brief is the product solely of the undersigned and that the undersigned have not received outside assistance of any kind in connection with the preparation of our brief.

*Team #6*

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Team Designation #6