

No. CV 11-55440 NCA (ABCx)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE 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 for the
Southern District of New York

BRIEF FOR APPELLANTS

Team #13
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Dated: January 11, 2013

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Considering that congressional purpose is the 'ultimate touchstone' in every preemption case, does the Federal Meat Inspection Act preempt New York's Animal Products Consumer Information Act, when the two statutes are aimed at accomplishing different goals at different ends of commerce, Congress did not intend to prohibit general consumer warnings or occupy the entire field of meat commerce, and both statutes can be simultaneously enforced without impairing the federal superintendence of the field?
2. Considering that the Animal Products Consumer Information Act applies equally to all products in interstate commerce and the only distinction made on state origin in the law's application consists of a minor noting of farms that engage in practices more in line with the state's important and legitimate local interests, does this small distinction warrant invalidating the whole statute?

STATEMENT OF THE CASE

Appellee, the National Meat Producers Association ("NMPA"), a national trade association of meat producers, filed this action against the Appellants, the Commissioner of the New York State Department of Agriculture and Markets and the New York State Department of Agriculture and Markets itself ("NYSDAM"), in the United States District Court for the Southern District of New York. Seeking a declaratory judgment and injunctive relief, the NMPA claimed that the Animal Products Consumer Information Act ("APCIA"), N.Y. Agric. & Mkts. Law § 1000, is unconstitutional. First, the NMPA claimed that the APCIA's 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 required in the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§ 601-678. (Mem. 1-2.) Second, NMPA claimed that the

APCIA discriminates against out-of-state meat processors and imposes an unreasonable burden on interstate commerce in violation of the Commerce Clause. (Mem. 2.)

The NMPA moved for summary judgment under Fed. R. Civ. P. 56 on both claims. (Mem. 2.) On the NMPA's first claim, the District Court rejected the NMPA's allegations and found that the FMIA does not preempt the APCIA. (Mem. 18.) As to the NMPA's second claim, however, the District Court found no genuine dispute of material fact (Fed. R. Civ. P. 56(a)), determined that the APCIA violates the Commerce Clause of the U.S. Constitution, and granted the NMPA's Motion for Summary Judgment. The District Court ordered judgment to be entered in favor of the NMPA on September 15, 2012. (Mem. 21.) The Appellants have filed a timely notice of appeal of the District Court's judgment.

STATEMENT OF THE FACTS

I. Federal Regulation of Meat and Meat Food Products

The FMIA regulates labeling and inspection of meat and meat food products in the US. 21 U.S.C. §§ 601-678. The FMIA protects consumers "by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602. The FMIA does not require dissemination of information about animal agriculture practices or the health risks associated with consuming "wholesome, not adulterated" meat and meat food products. The FMIA includes preemption language prohibiting states from imposing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter." 21 U.S.C. § 678. The FMIA also states, however, that it "shall not preclude any State [. . .] from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." *Id.*

II. The APCIA's Enactment and Rationales

In 2010, after hearing over 1,000 hours of expert testimony, New York enacted the APCIA to "protect the citizens of [New York] 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.

New York's significant budget constraints and financial problems also motivated enactment of the APCIA. On the basis of expert testimony, the New York legislature believed the reduction in animal product consumption would ease state financial pressures through a variety of means, including lower health care costs and reduced environmental protection burdens. (Mem. 3.) As part of the law's implementation, a state-sponsored website provided detailed information to consumers about animal product consumption and the associated consequences for human health, the environment and animal suffering. (Mem. 4.) The website also provided a list of farms that New York found to employ environmentally sustainable and humane welfare standards. The list included only farms located in New York. *Id.*

III. The APCIA's Placard Requirement

Pursuant to the goals enumerated above, the APCIA requires New York retailers to display a sign or placard wherever animal products intended for human consumption are sold, 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.

N.Y. Agric. & Mkts. Law § 1000.4.1. To fulfill this requirement, placards must be at least eighteen by twenty-four inches in size with a yellow background, red text, and letters at least one and one-half inches in height. Agric. & Mkts. § 1000.4.2. In all retail contexts selling animal products for consumption, the required placard must be "clearly visible" to customers. Agric. & Mkts. §§ 1000.4.3-4. In food service establishments or other public eating places, though, the required information may be "printed on a menu in type and lettering similar to, and as prominent as, that normally used to designate the serving of other food items." Agric. & Mkts. § 1000.4.4.

Shortly after the APCIA's enactment, the NMPA filed suit against the Appellants.

SUMMARY OF ARGUMENT

The District Court's holding as to preemption should be affirmed because the District Court correctly found that the FMIA does not expressly nor impliedly preempt the APCIA's placard requirement. The District Court's holding as to the NMPA's Commerce Clause claim and on the NMPA's Motion for Summary Judgment, however, should be reversed.

First, the District Court's overall holding as to preemption should be affirmed because the APCIA's placard requirement is outside the scope of the FMIA's express preemption language. The express preemption language does not reach the placard requirement for two main reasons. First, the practical relationship between the required placards and meat or meat food products indicates that the placards do not constitute "labeling" that "accompanies" meat or a meat food product. *See New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 118-20 (2d Cir. 1989). Second, Congress did not intend for the FMIA to prohibit general consumer warnings designed to help consumers make informed health decisions, and analysis of a statute's preemptive scope "must rest primarily on 'a fair understanding of *congressional purpose*.'"

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 n.27 (1992)).

Second, the District Court's preemption holding should be affirmed because the FMIA does not impliedly preempt the APCIA's placard requirement. The APCIA is not preemption through field preemption because the FMIA clearly disclaims an intention to occupy the entire field of meat commerce. *See* 21 U.S.C. § 678. Preemption cannot be inferred from conflict between the statutes either, since compliance with both the FMIA and the APCIA is not impossible, and the APCIA does not place obstacles in the way of compliance with or enforcement of the FMIA. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Third, the District Court's holding as to the NMPA's Commerce Clause claim and on the NMPA's Motion for Summary Judgment should be reversed. The APCIA complies facially and in effect with the Commerce Clause because the law treats both intrastate and interstate animal products equally. N.Y. Agric. & Mkts. Law § 1000. The District Court erred in finding that the listing of farms that had superior environmental and animal treatment practices on a state-sponsored website promoted the purchase of in-state over out-of-state products. Listing these farms only notes those farms for their environmental and animal welfare stewardship, not animal product health benefits. Rather, the website continues to deter consumers from animal product consumption, including those from the listed farms. Even if the list constitutes discrimination, the dormant Commerce Clause allows for such discrimination because the law's benefits outweigh any discriminatory effects and the government lacked a nondiscriminatory alternative. Furthermore, even if the District Court did not error in finding a violation, it erred in striking down the law; the court should only have proscribed the narrow misapplication of the law to cure

any constitutional defect.

STANDARD OF APPELLATE REVIEW

A district court's grant of summary judgment warrants *de novo* review. *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 85 (2d Cir. 2006). A court may grant summary judgment when there remains no genuine issue of dispute for any material fact and the moving party has the right to judgment as a matter of law. Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists when the nonmoving party has sufficient evidence in its favor "for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In assessing the record to determine if such an issue exists, a reviewing court views the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences and resolving all ambiguities in its favor. *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 284 (2d Cir. 2005) (quoting *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 88 (2d Cir. 2003)). Courts review *de novo* if a statute as a matter of law discriminates on its face or in its effect. Contention that a statute discriminates impermissibly against interstate commerce forms a mixed question of law and fact also reviewed *de novo*. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir. 2003) citing *Scribner v. Summers*, 84 F.3d 554, 557 (2d Cir.1996).

ARGUMENT

I. THE APCIA IS NOT PREEMPTED BY THE FMIA BECAUSE THE APCIA'S PLACARD REQUIREMENT IS OUTSIDE THE SCOPE OF THE FMIA'S EXPRESS PREEMPTION LANGUAGE, CONGRESS DID NOT INTEND TO PREEMPT GENERAL CONSUMER WARNINGS ABOUT MEAT CONSUMPTION AND ANIMAL AGRICULTURE, AND BOTH THE APCIA AND THE FMIA CAN BE ENFORCED WITHOUT IMPAIRING FEDERAL SUPERINTENDENCE OF THE FIELD OF MEAT COMMERCE.

The Supremacy Clause of the United States Constitution instructs that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof, and the Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land." U.S. Const. art. VI, cl. 2. This language gives Congress the authority to preempt state law, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986), and "our sole task [in determining whether a state statute is preempted by federal law] is to ascertain the intent of Congress," *Cal. Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 280 (1987).

Congress's intent to preempt state law can be expressly stated or implied. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Express preemption occurs when Congress explicitly states "its intention to preclude state regulation in a given area." *Bedford Affiliates v. Sills*, 156 F.3d 416, 426 (2d Cir. 1998) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). When Congress has not expressly preempted state law, an intention to supersede state regulation can be inferred in at least two ways from the statute's structure and purpose. *See Jones v. Rath Packing Co.*, 430 U.S. at 525.

First, a congressional intent to occupy the regulatory field can be inferred when "the

scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Gade*, 505 U.S. at 98 (quoting *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982)). Second, "[e]ven where Congress has not entirely displaced state regulation in a specific area, [preemption may be inferred where state law] actually conflicts with federal law.'" *Grocery Mfrs. Of America, Inc. v. Gerace*, 755 F.2d 993, 999 (2d Cir. 1985) (quoting *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204 (1983)). An actual conflict exists when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers*, 373 U.S. at 142-43, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67.

The FMIA states that "[. . .] labeling [. . .] requirements in addition to, or different than, those made under this chapter may not be imposed by any State [. . .]." 21 U.S.C. § 678. Since, however, "[t]he purpose of Congress is the ultimate touchstone' in every preemption case," the preemptive effect of the FMIA depends on if Congress intended this language to reach the APCA's placard requirement. *Medtronic*, 518 U.S. at 485 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). If Congress did not have such an intention, the FMIA's preemptive effect depends on whether federal law occupies the entire field of meat commerce or an actual conflict exists between enforcement of both the FMIA and the APCA.

A. The FMIA's Express Labeling Preemption Does Not Reach the APCA's Placard Requirement.

Though the FMIA's preemptive language indicates that Congress intended the FMIA to preempt at least some state law, this Court "must nonetheless 'identify the domain expressly pre-

empted' by that language." *Medtronic*, 518 U.S. at 484 (quoting *Gade*, 505 U.S. at 111, (1992) (Kennedy, J., concurring in part and concurring in judgment)). Such interpretation "is informed by two presumptions about the nature of pre-emption." *Medtronic*, 518 U.S. at 485.

First, interpretation of preemptive scope must be informed by "[. . .] 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." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This is particularly true in those preemption cases where Congress has "legislated [. . .] in a field which the States have traditionally occupied,' [. . . such as] regulation of matters of health and safety." *Id.*

Second, because of the importance of congressional intent in every preemption case, analysis of a statute's preemptive scope "must rest primarily on 'a fair understanding of congressional purpose.'" *Medtronic*, 518 U.S. at 485-86 (quoting *Cipollone*, 505 U.S. at 530 n.27). Congressional purpose may be discerned from the preemption language of the federal statute, the statutory framework surrounding it, and the structure and purpose of the statute as a whole, understood in terms of how it was intended to "affect business, consumers, and the law." *Medtronic*, 518 U.S. at 486.

These presumptions instruct that the FMIA's preemption language should be given a narrow reading closely tied to the intent behind the express preemption language and the purpose of the FMIA itself. The FMIA prohibits the imposition of state "[. . .] labeling [. . .] requirements in addition to, or different than, those made under this chapter [. . .]." 21 U.S.C. § 678. 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(p). Because the FMIA explicitly preempts labeling requirements "in addition to, or

different than, those made" in the FMIA and defines "labeling," a clear congressional intent to expressly preempt the APCIA exists if the placard requirement constitutes "labeling." More specifically, since the APCIA placards are not required to appear "upon any article or any of its containers or wrappers," Congress expressly intended to preempt the APCIA if the placard requirement constitutes "labels [or] other written, printed, or graphic matter [. . .] accompanying such article[s]" regulated by the FMIA. *Id.*

1. The FMIA's express preemption language does not reach the APCIA because the placard requirement does not constitute "labeling."

Determining whether the APCIA's placard requirement constitutes "labeling" requires statutory construction of the phrase "labels [or] other written, printed, or graphic matter . . . accompanying" meat or meat food products. 21 U.S.C. § 601(p). Statutory construction "begins with the language of the statute[, . . . and w]here the meaning is clear, ' the sole function of the courts is to enforce it according to its terms.'" *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 118 (2d Cir. 1989) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). The District Court found that:

"accompanying" must mean 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 in signs, placards, or posters near the product. Any other definition would undermine the [FMIA] and render the "accompanying such article" language meaningless.

(Mem. 12.)

Courts, however, have been mixed on whether signs or placards constitute labels or other matter accompanying regulated items. *See, e.g., Meaunrit v. ConAgra Foods Inc.*, 2010 WL 2867393, *8 (N.D. Cal. 2010) (holding that an in-store poster advertising microwaveable pot pies was a label as defined by the FMIA); *Gershengorin v. Vienna Beef, Ltd.*, 2007 WL 2840476,

*3 (N.D. Ill. 2007) ("The FMIA does not preempt regulation of signage separate from the marking or labeling on meat packaging itself."); *American Meat Institute v. Ball*, 424 F.Supp. 758, 776 (D. Mich. 1976) (holding that, because the word "accompany" should be given an interpretation that accords with Congressional purpose, informational placards required by Michigan law did not constitute "labeling" as that term is defined by the Federal Wholesome Meat Act); *American Meat Institute v. Leeman*, 102 Cal. Rptr. 3d 759, 784-85 (2009) (holding that point of sale consumer warnings required by California law constitute "labeling" within the meaning of the FMIA preemption provision).

These varying interpretations all suggest that the meaning of "accompanying," in the context of the FMIA's labeling and preemption provisions is, at the very least, ambiguous. Such ambiguity suggests that this Court can look beyond the "plain meaning" of "accompanying" when interpreting the FMIA. The Second Circuit has not analyzed the issue at bar with reference to the FMIA, but it has analyzed nearly identical provisions found in the Federal Insecticide, Fungicide & Rodenticide Act ("FIFRA"), 7 U.S.C. § 136. Notably, the Second Circuit came to a different conclusion than the District Court when it interpreted the meaning of "accompany" with reference to FIFRA's labeling definition and preemption language. *See Jorling*, 874 F.2d at 118-20.

Jorling involved a New York law designed to ensure public awareness when, in the context of commercial lawn care, poisonous chemicals are being or have been used. *Id.*, 874 F.2d at 116. The regulations promulgated to implement the law included various notice requirements for those who apply commercial pesticides:

They must enter into a written contract with the owner of the premises where extermination is to occur, . . . and provide a list of the chemicals being applied along with any warnings which appear on the pesticide's . . . label. Moreover, they are required to give the prospective purchaser a notification "cover sheet" which provides

further warnings and safety information. In addition, signs must be posted on the perimeter of the affected property, instructing persons not to enter the area for a 24-hour period.

Id. (citation omitted). Much like the FMIA, FIFRA prohibits states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter," 7 U.S.C. § 136v(b), and defines "labeling" as "all labels and all other written, printed, or graphic matter [. . .] accompanying the pesticide or device at any time [. . .]." 7 U.S.C. § 136(p). The *Jorling* court framed its analysis by explaining that "'[l]abeling' is better understood by its relationship, rather than its proximity, to the product." 874 F.2d at 119. Since the New York notifications were aimed at "the general public [. . .] as well as those who contract to have pesticides applied" (as opposed to FIFRA-required labels, which are designed to be read and followed by end users), the court determined that the "mere proximity of the [New York] warning[s]" to pesticide-treated areas did not "transform the admonition[s] into 'labeling' within the meaning of FIFRA." *Id.*

The relationship between the New York pesticide notifications and pesticide treatments is similar to the relationship between the APCIA's placard requirement and meat products. Just as the notifications in *Jorling* were directed towards the general public and consumers contracting for pesticide application, the APCIA's placard requirement is aimed at the general public, consumers shopping for groceries, and restaurant patrons. The notifications in both instances are meant to inform and warn the public of general risks associated with a certain product; in neither case are the notifications meant to guide end users in their specific use of that product or assure users that the product is not adulterated or misbranded. On the other hand, the labeling requirements in the FMIA, like those in FIFRA, focus on identifying and explaining the product to end users and assuring end users of the product's quality and character. *See* 21 U.S.C. §

601(m)-(n).

Thus, this Court should apply the definition of "accompanying" it previously applied in *Jorling* instead of the broad definition assumed by the District Court ("any printed material displayed with the intent of conveying information about the product"). (Mem. 12.) When the APCIA's placard requirement is viewed in terms of its "relationship, rather than its proximity" to meat products, *Jorling*, 874 F.2d at 119, it becomes clear that the placards do not convey information about any one specific meat product available for purchase; instead, they are general public warnings that convey information about lifestyle choices and their consequences. To say that these placards constitute "labeling" that "accompanies" meat products offered for sale would be to stretch the preemptive scope of Congress's words too far to justify encroaching upon "a field which the States have traditionally occupied," that of public health and safety. *Medtronic*, 518 U.S. at 485 (quoting *Santa Fe Elevator Corp.*, 331 U.S. at 230).

2. Furthermore, the FMIA's express preemption language does not reach the APCIA because Congress did not intend for the FMIA to preempt general consumer warnings about consumption and production of animal products.

In addition to construction of the statute itself, analysis of a statute's preemptive scope "must rest primarily on 'a fair understanding of *congressional purpose*.'" *Medtronic*, 518 U.S. at 485-86 (quoting *Cipollone*, 505 U.S. at 530 n.27). As mentioned previously, congressional purpose may be discerned from the preemption language of the federal statute, the statutory framework surrounding it, and the structure and purpose of the statute as a whole, understood in terms of how it was intended to "affect business, consumers, and the law." *Medtronic*, 518 U.S. at 486.

The FMIA was enacted to protect the "health and welfare of consumers [. . .] by assuring

that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602. The FMIA's interest in safeguarding public health and welfare has economic implications as well:

[u]nwholesome, adulterated, or misbranded meat or meat food products . . . destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products [. . .]. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally.

Id. The APCIA is also directed towards protecting public health and welfare, but seeks to accomplish such protection in a different way:

This Act is designed 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 two rationales enumerated above show that the FMIA was designed to protect consumers from adulterated or misbranded meats and protect the market from those who might undercut competition through deceptive practices, while the APCIA was designed to spread knowledge that might help consumers make informed choices about their consumption of animal products. These goals, while both may protect consumers, are separate and distinct.

Additionally, the statutes differ in their enforcement and effect because the FMIA's requirements focus on producers and the APCIA's requirements focus on retailers. On this point, the Supreme Court has stated that "[c]ongressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end." *Florida Lime & Avocado Growers*, 373 U.S. at 145. Therefore, not only do the FMIA and the APCIA focus on accomplishing different goals, but they also impact different industry players. The FMIA

preemption language makes sense in the context of preventing states from imposing labeling requirements that would make federal regulation of meat quality more difficult and impose more complicated requirements on producers. Such requirements would make compliance more difficult and costly, likely resulting in higher priced meats for consumers. The APCIA's placard requirement would not create any of these problems. Retailers can comply with the APCIA simply by displaying the required warning wherever "animal products intended for human consumption are offered for sale." N.Y. Agric. & Mkts. Law § 1000.4.1. Thus, the apparent congressional purpose behind the FMIA and its preemption provision shows that Congress did not, in fact, intend for the preemption provision to reach the APCIA's placard requirement.

B. By Enacting the FMIA, Congress Did Not Intend To Occupy the Field of Meat Commerce.

A congressional intent to occupy a regulatory field may be inferred "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Santa Fe Elevator Corp.*, 331 U.S. at 230. The FMIA expressly disclaims intent to occupy the field of meat commerce entirely. In 21 U.S.C. § 678, the FMIA 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." Additionally, as the District Court notes, "the FMIA contains a narrow inspection and labeling preemption clause, and 'Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." (Mem. 15., quoting *Cipollone*, 505 U.S. at 517). These factors show the FMIA does not preempt the APCIA by way of field preemption because Congress did not intend to occupy the field of meat commerce to the exclusion of all state regulation.

C. The FMIA and the APCIA Are Not In Conflict.

The last possible basis on which the FMIA could preempt the APCIA is conflict preemption. However, the FMIA and the APCIA are not in conflict, so conflict preemption fails as well. An actual conflict exists between federal and state law if "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers*, 373 U.S. at 142-43, or the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67.

Compliance with both the FMIA and the APCIA is not a physical impossibility because the laws' respective requirements impact different actors in the meat industry. The labeling requirements of the FMIA are to be enforced against producers of meat and meat food products, whereas the APCIA's placard requirement impacts only retailers who sell animal products. Even if a producer also maintains a retail operation, it would not be impossible to comply with both the FMIA and the APCIA, since the requirements for each do not overlap.

Additionally, the APCIA does not stand as an obstacle to the accomplishment and execution the FMIA's congressional purpose. The APCIA simply focuses on providing the public with general information about the risks associated with the production and consumption of animal products. "The [APCIA] does not stand as an obstacle to realizing the FMIA objective of 'assuring that meat and meat food products distributed to [consumers] are wholesome, not adulterated, and properly marked, labeled and packaged.' 21 U.S.C. § 602." (Mem. 16.) Compliance with both laws would not harm consumers or increase the likelihood that adulterated or misbranded meats would reach consumers. Thus, the APCIA is also not preempted through conflict preemption.

In sum, the APCIA's placard requirement does not constitute "labeling" under the

FMIA's preemption provision, the congressional purpose behind the FMIA reveals that Congress did not intend for the FMIA to preempt general consumer warnings, Congress expressly stated that it did not intend to occupy the entire field of meat commerce, and no actual conflict in enforcement or compliance exists between the FMIA and the APCIA. Based on these conclusions, the FMIA does not preempt the APCIA.

II. THE APCIA COMPLIES FACIALLY AND IN EFFECT WITH THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION BECAUSE THE LAW DOES NOT EXCEED STATE POWER TO REGULATE COMMERCE IN NEW YORK.

The APCIA, N.Y. Agric. & Mkts. Law § 1000, concerns agricultural and food products. The Complaint 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, U.S. Const., art. I, § 8, cl. 3. The New York law does not conflict with the Commerce Clause on its face or as applied. Even if the APCIA conflicts with the Commerce Clause in New York's listing of certain farms, the alleged violation does not present a reason to invalidate the whole law. Rather, in such a finding, the court should only proscribe the narrow misapplication of the New York law to cure any constitutional defect.

A. The Law Complies Facially and In Effect With the Dormant Commerce Clause Because the Law Does Not Discriminate Among In-State and Out-of-State Suppliers of Animal Products.

The Commerce Clause provides that "Congress shall have Power [...] [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., art. I, § 8, cl. 3. Although the Constitution does not limit states' powers to regulate commerce, the Supreme

Court has long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citing *Cooley v. Bd. of Wardens of Port of Philadelphia, to Use of Soc. for Relief of Distressed Pilots, their Widows & Children*, 53 U.S. 299 (1851)). The Commerce Clause contains a negative component, referred to as the "dormant Commerce Clause," which limits the extent to which States can interfere with interstate commerce. This dormant Commerce Clause keeps states from "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Am. Trucking Ass'n, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (citing *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)).

The dormant Commerce Clause fundamentally aims to preserve national market "competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2003) (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997)). In analyzing a dormant Commerce Clause challenge, courts first determine if a statute clearly discriminates against interstate commerce in favor of intrastate commerce, or if it regulates evenhandedly with only incidental effects on interstate commerce. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47 (2d Cir. 2007); see *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 217–18 (2d Cir. 2004). The term discrimination in this context "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994).

The APCIA does not conflict with the dormant Commerce Clause. It treats both intrastate and interstate animal products equally. N.Y. Agric. & Mkts. Law § 1000. The

information on the placards applies to all animal products sold within New York, not just those from out-of-state producers. *Id.* The law aims to and will likely reduce overall animal products sales within New York. These sale reductions will occur from both intrastate and out-of-state sources equally. The New York law does not place a burden on out-of-state producers because New York retailers, not producers, have the responsibility to display the placard and to display regardless of a product's state origin. *Id.*

The District Court found that the listing of farms that had superior environmental and animal treatment practices on a state-sponsored website promoted the purchase of in-state products from these farms over out-of-state products. Under the District Court's interpretation, this promotion violated the dormant Commerce Clause. However, the listing of certain farms on a state website does not violate the Commerce Clause and, if it does, would not warrant striking down the entire statute. Listing these farms only promotes those farms for their environmental and animal welfare stewardship. The listing does not promote these farms as a healthy alternative to animal product consumption; rather, the statute, placard and website continue to try to dissuade consumers from buying animal products in general, including those from farms listed on the website out of health concerns.

While it may seem that only including an online list of New York farms that have good environmental and animal welfare practices discriminates against out-of-state farms, this does not make sense when viewed in light of New York's legitimate legislative goals. The website aims to benefit consumers in New York, allowing them to make informed choices. Giving consumers information on in-state farming practices allows New York residents the opportunity to influence their local practices related to their local environmental concerns that directly relate to state budget and environmental burdens. New York has no obligation to influence interstate

environmental practices with regard to environmental protection or animal welfare. However, in-state practices form legitimate state concerns. *See e.g., New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994) (identifying environmental protection as in the public interest); *U.S. v. Stevens*, 130 S.Ct. 1577, 1585 (2010) (concerning animal cruelty laws); *McGill v. Parker*, 582 N.Y.S. 2d 91, 96 (1992) (identifying the treatment of horses as a public concern); *Safarets Inc. v. Gannett Co., Inc.*, 361 N.Y.S. 2d 276, 280 (1974) (noting humane treatment of animals as in the public interest); *Farm Sanctuary, Inc. v. Dep't of Food & Agric.*, 63 Cal. App. 4th 495, 504 (1998) (finding the humane treatment of animals a public interest issue).

In addition, the District Court's finding that a state's promotion of its agriculture violates the commerce clause does not fit logically with common federal and state programs. The federal government has expressly funded state programs to promote state agricultural products. 7 U.S.C. § 1623(b). To allow and provide federal funds to states to market state products to consumers while, in this case, considering the promotion of state products to consumers unconstitutional would not make sense.

B. Even If the Listing of New York Farms Constitutes Discrimination, the Dormant Commerce Clause Allows For Such Discrimination Because the Benefits of the Law Outweigh Its Discriminatory Effects and the Government Lacked a Nondiscriminatory Alternative to Protect Local Interests.

If the court finds discrimination in the online listing of certain farms, the law does not automatically violate the dormant Commerce Clause. To determine a violation, a court must apply the appropriate scrutiny level. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47 (2d Cir. 2007). A court will find a law that clearly discriminates against interstate commerce virtually invalid per se; the law will survive only if the law serves a purpose “demonstrably

justified by a valid factor unrelated to economic protectionism.” *Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992). For laws that only incidentally burdens interstate commerce, courts will subject the law to the more permissive balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, (1970), striking down the law if the burden imposed on interstate commerce clearly exceeds the assumed local gains. The party challenging a law, the National Meat Producers Association (“NMPA”) in this case, bears the burden of demonstrating as either clearly discriminatory or in violation of the *Pike* test that the law “has a disparate impact on interstate commerce—‘[t]he fact that it may otherwise affect commerce is not sufficient.’” *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47 (2d Cir. 2007) (quoting *Automated Salvage Transp., Inc. v. Wheelabrator Env’tl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998)). Providing information on some practices used at some state farms does not itself demonstrate a disparate impact on interstate commerce even if it may otherwise affect commerce, something also not demonstrated in the case.

A clearly discriminatory law may operate in three ways. A discriminating statute may facially discriminate. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 48 (2d Cir. 2007) (citing, e.g., *Granholm v. Heald*, 544 U.S. 460, 466, (2005) (striking down state laws restricting out-of-state, but not in-state wineries, from selling wine directly to in-state consumers); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 568 (1997) (striking down statute that denied beneficial tax treatment to entities that principally benefited non-residents); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 618 (1978) (striking down import prohibition on most out-of-state waste)). A discriminating statute may have a discriminatory purpose. *Town of Southold*, 477 F.3d at 48 (citing, e.g., *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352–53 (1977) (striking down facially neutral statute prohibiting state grading on apple

boxes after linking statute to a means to discriminate against Washington apples); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269 (1984) (striking down a facially neutral statute exempting certain locally-produced alcoholic beverages from an excise tax because legislative history showed intent to foster local industry)). A discriminating statute may discriminate in its effect. *Town of Southold*, 477 F.3d at 48 (citing, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (striking down facially neutral law imposing assessment on all milk sold to retailers because a subsidy entirely offset the effect on producers in state, but not out of state)).

The APCIA does not fall into any of these categories. The APCIA does not facially discriminate because it discourages the purchase of animal products indifferent to origin. The record shows no evidence that New York enacted the APCIA for the purpose of discriminating against out-of-state interests, but rather for the purely state interests of New York's budget, citizen health, environment and animal welfare. (Mem. 3-18.) In addition, the NMPA has offered no evidence that the APCIA has in effect distinguished between in-state and out-of-state parties, except in the listing of certain farms. This distinction does not constitute discrimination because the website as a whole discriminates against all animal products regardless of state origin, environmental record or animal stewardship practices. It would be illogical to find the list as discriminatory in favor of in-state farms when the law plainly discriminates against all animal products, including from these listed farms. Even if the list has an economic effect on out-of-state farms, that does not mean that APCIA regulates or discriminates against interstate commerce. The law does not govern animal product market, production or pricing. Thus, it neither regulates nor discriminates against interstate commerce. See *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579-80 (1986).

While the NMPA may fail in its claim that the APCIA clearly discriminates in violation

of the Commerce Clause, the NMPA may claim, as the District Court found, that the balancing test from *Pike v. Bruce Church, Inc.* applies. 397 U.S. 137, 142 (1970). If the District Court correctly reasoned that the statute discriminated, as implemented, through the website, the District Court misapplied the so-called *Pike* test. When a state enacts law 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 the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. If courts find a legitimate local purpose, then the question becomes one of degree. *Id.* Courts will tolerate burdens on commerce depending on the nature of local interests involved and if a state can promote those interests with lesser impact on interstate activities. *Id.* In this case, New York enacted the law for the legitimate public interest to protect state citizens “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.

An incidental burden under the *Pike* test refers to regulations that “must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce.” *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001). Courts find three circumstances when evenhanded regulation imposes an incidental burden on interstate commerce: “(1) when the regulation has a disparate impact on any non-local commercial entity; (2) when the statute regulates commercial activity that takes place wholly beyond the state's borders; and (3) when the challenged statute imposes a regulatory requirement inconsistent with those of other states.” *United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 156–57 (2d Cir. 2006), aff'd, 550 U.S. 330 (2007); *see Sal*

Tinnerello & Sons, Inc. v. Town of Stonington, 141 F.3d 46, 55 n. 9 (2d Cir. 1998). The NMPA may contend that the regulation, in listing some New York farms, has a disparate impact on out-of-state competing animal farms. The APCIA does not regulate commerce wholly beyond New York's borders or conflicts with other jurisdictions' regulatory requirements as the regulation applies to in-state retailers. N.Y. Agric. & Mkts. Law § 1000.3.

If such a disparate impact exists, the website creates a very small burden because the list only concerns environmental and animal welfare issues, not human health, and in-state sales from the listed farms still must comply with the law's requirements. Hence, on the burden side of the *Pike* balancing equation, genuine issues of material fact exist concerning the degree of burden on interstate commerce and the District Court erred in granting summary judgment.

If the Court considers the noting of in-state farms a discrimination against out-of-state commerce, the burden falls on New York to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977) (citing *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951)). On the benefits side of the *Pike* equation, the APCIA offers numerous benefits to New York, its residents, the environment and animals. (Mem. 3-11.) The farm list does not conflict with the Commerce Clause because states have a legitimate interest in protecting and enhancing their growers' reputations. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970) (citing *Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915)).

The District Court erred in finding nondiscriminatory alternatives that adequately preserve local interests. The District Court offered that New York could add qualifying outside farms' names. (Mem. 20.) However, this would significantly increase New York's costs compared to the cost of gathering information on only New York farms. *Id.* This would work

against New York's goal to save money in passing the APCIA. (Mem. 3.) The District Court contends the website could include no farm names. However, this would defeat the APCIA's goal to help consumers make informed choices. (Mem. 2.)

The District Court also found that New York could have enacted other legislation to protect the health of its citizens, farm animals, and the environment that would not have had an impact on interstate commerce. (Mem. 20.) The website's list only concerns animal and environmental practices, eliminating the need to find alternatives that impact citizen health. Since New York cannot regulate out-of-state practices, New York has few options to impact animal welfare and environmental practices outside the state, except, as with the APCIA, providing information aimed at reducing consumer demand for animal products to influence the interstate market. The website's only relevant possible impact constitutes an influence on consumer demand for animal products from farms based on the list. Without creating burdensome environmental and animal welfare regulations, highlighting good practices seems a low burden means to achieve local goals.

C. The District Court Erred, Even If the Listing of Certain New York Farms Constituted Impermissible Discrimination, Because Such Discrimination Does Not Merit Invalidation of the Law.

The record and District Court case show clearly that the APCIA does not, with one exception, the listing of certain NY farms, distinguish among products based on origin. Rather, the law targets the products and production methods. However, should a court find the listing of farms an unacceptable form of distinction, the best remedy would modify the application of the facially neutral statute as this Court has done in other agricultural products cases. *Nat'l Farmers Org. Irasburg v. Comm'r of Agric., State of Conn.*, 711 F.2d 1156, 1164 (2d Cir. 1983)

(preventing Connecticut from using a statute to delay issuing dairy import permits to Vermont applicants that met certain proof requirements while upholding the statute). The court could uphold the statute while requiring the website to not list farms, but rather means of identifying farms that practice good animal welfare and environmental practices until New York has the will or finances to list all applicable farms regardless of state origin.

CONCLUSION

For the reasons stated above, this Court should **AFFIRM** the District Court's holding as to preemption, **REVERSE** the District Court's holding as to the Commerce Clause, and **REVERSE** the District Court's entry of summary judgment in favor of the NMPA.