Case No.: CV 11-55440 NCA (ABC)

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,
Appellant

Appeal from the United States District Court from the Southern District of New York

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BRIEF OF APPELLEE

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

STATEMENT OF THE ISSUES

I. UNDER THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION, SHOULD THIS COURT OVERTURN THE DISTRICT COURT'S DENIAL OF RELIEF BECAUSE THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT IS PREEMPTED BY THE FEDERAL MEAT INSPECTION ACT?

II. UNDER THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION, SHOULD THIS COURT AFFIRM THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT'S PLACARD REQUIREMENT VIOLATES THE DORMANT COMMERCE CLAUSE?

STATEMENT OF THE CASE

This Court is being asked to reverse the United States District Court for the Southern District of New York's denial of declaratory and injunctive relief as to Count 1, and to affirm the district court's grant of summary judgment as to Count 2.

Appellee, the National Meat Producer Association, ("NMPA"), brought an action for declaratory judgment and injunctive relief, asserting that the Animal Products Consumer Information Act's, ("APCIA"), placard requirement is unconstitutional for two reasons: it violates the Supremacy Clause by requiring a label that is "in addition to or different than" those specified in the Federal Meat Inspection Act, ("FMIA"), 21 U.S.C. §§ 601-695 (2011), and because it violates the Commerce Clause by both discriminating against out-of-state meat processors and imposing an unreasonable burden on interstate commerce.

The district court recognized that the APCIA's placard requirement constituted "labeling" as defined by the FMIA. Op. at 12. Yet the district court denied the NMPA's motion for summary judgment on Count 1, asserting that the FMIA is more concerned with "regulating the quality of the product and information provided by the producers and distributors" and not as much with consumers' health, the environment, or animal handling practices as they relate to animal production. *Id.* at 14.

The district court granted the NMPA's motion for summary judgment on Count 2, holding that the law did not survive the *Pike* test, while failing to recognize that a law can discriminate in its effects even if not on its face. *Id.* at 21.

STATEMENT OF THE FACTS

The State of New York, ("State"), passed the APCIA, N.Y. Agric. & Mkts. Law § 1000, in 2010 as a precursor to future widespread state regulation of corporate farming. Op. at 3. In efforts to reduce state expenditures on healthcare and the environment, the State appointed a committee to make recommendations to its legislature for what types of action the legislature should take to achieve these goals. *Id*. The committee suggested that the State legislature pass regulations that would "encourage the reduction of the public's consumption of animal products which would in turn reduce the long-term health care and environmental costs to the state." *Id.* Almost as an afterthought, the legislature decided that the regulations should also demonstrate a concern with the humane treatment of animals. *Id.* Thus, the legislature produced the APCIA. *Id.*

At issue in this case is the APCIA's placard requirement, as well as the State-sponsored website listed on the placard. The placard must be "prominently displayed wherever animal products intended for human consumption are offered for sale." N.Y. Agric. & Mkts. Law § 1000.4.1. The placard must be at least 18 by 24 inches, "printed in letters not less than 1 ½ inches high," and "all letters in the sign shall be in red on a yellow background." *Id.* § 1000.4.2. In addition, if the business is a "food service establishment or other public eating place," the placard must be "clearly visible to all customers, or 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." *Id.* § 1000.4.4. The language on the placard must read:

> PUBLIC INTEREST WARNING: Many chronic diseases, including heart disease, can largely be prevented and, in many cases, reversed by avoiding the consumption of animal products and eating a whole food, plant based diet.

> Industrial animal agriculture is also a major source of pollution. Animal handling techniques also lead to animal suffering. The State encourages its citizens to conduct research and make informed choices when purchasing and consuming animal products. For more information, visit www.informedchoice.ny.gov.

Id. at § 1000.4.1. The website itself "provides detailed information on the health effects of consuming animal products and the impact of animal agriculture on the environment and animal suffering." Op. at 4. More notably, the website provides a list of farms that the State "determined were environmentally sustainable and employed humane welfare standards." *Id.* All of the farms on this list are located within the State. *Id.* In addition, the website offers no information regarding what standards it used in selecting these farms for its list.

SUMMARY OF THE ARGUMENT

The APCIA is unconstitutional on multiple levels. Specifically, the APCIA's placard requirement violates the Supremacy Clause of the U.S. Constitution because it is preempted by the FMIA, both expressly and impliedly. Also, the placard requirement violates the Commerce Clause under both a discrimination standard and under the more permissive *Pike* balancing test.

The APCIA placard must constitute labeling to fall within the meaning of the FMIA preemption provision, and then the State law can be analyzed for preemption. As a threshold matter, the APCIA placard is indeed a "labeling" requirement. The statutory definition and interpretations of the term "labeling" extend to point of sale warnings. Also, the APCIA placard accompanies the product by giving a supplemental warning of the meat or meat product offered for sale which falls within the meaning of the FMIA's preemption provision.

The State law may be found to be preempted on two separate grounds: express and implied preemption. The placard requirement is expressly preempted by the FMIA. The State law is going against the FMIA's expressed language restricting states from enacting any law that requires labeling in addition to or different than the labeling the FMIA already requires. The

placard falls within the FMIA's scope because it imposes broader regulations in the areas of health, humane treatment of animals, and the environmental effects from corporate farming—all areas that the FMIA regulates.

Additionally, the APCIA placard requirement is impliedly preempted by the FMIA because it causes a conflict in mutual compliance, frustrates the purpose of the FMIA, and attempts to regulate in a field reserved for the federal government. The State law would require retailers to breach the misbranding provision under federal law. In addition, retailers are given the "choice" of either complying with state law and in turn breaking the federal preemption clause, or complying with federal law and risking a fine of up to $1,000 per day from the State. Also, the State law warning would confuse and undermine consumer confidence and mislead consumers into not trusting the FMIA's regulations or actions. Moreover, the intent of Congress to solely inhabit the area of labeling requirements for animal production may be inferred because Congress left no room for supplemental state regulations on the matter of labeling. Express and implied preemption prohibit the State law; thus the State law violates the Supremacy Clause.

Furthermore, the placard requirement discriminates in its effects against interstate commerce and thus offends the dormant aspect of the Commerce Clause. When a law discriminates in its effects, it is subject to the rigorous standard of strict scrutiny. The State bears the burden of proving that the statute serves a legitimate purpose and that it is the least restrictive means of furthering that purpose. Here, the State has chosen one of the most discriminatory means of educating consumers about the environmental and health effects of eating meat, as well as about humane handling standards: its placard directs consumers to a website that lists only in-State farms as conducting their business according to the State's standards.

Contrary to what the State asserts, the State could achieve its goals by less discriminatory means, such as including the names of farms from all states, or not including a list at all. The State instead chooses to promote its own state's businesses to the detriment of out-of-state interests. Such blatant discrimination against interstate commerce is the type of economic protectionism the Commerce Clause has been interpreted to protect against.

If a statute is found to be discriminatory, the inquiry may stop there. However, even if the court proceeds to examine the statute under the *Pike* balancing test, the statute still offends the Commerce Clause. The placard requirement imposes an undue burden on interstate commerce when its website listings effectively promote in-state processors while excluding out-of-state processors. This State endorsement imposes a heavy burden on interstate commerce to the benefit of intrastate commerce. While the statute serves a legitimate purpose, the State has less discriminatory alternatives that would achieve the statute's goals while not imposing a clearly excessive burden on out-of-state processors.

The APCIA's goals of educating consumers are praiseworthy, but the State should be forced to create a more fine-tuned statute that does not overstep its bounds. In conclusion, the district court's ruling on Count 1 must be overturned, and its ruling on Count 2 must be affirmed.

ARGUMENT

I. STANDARD OF REVIEW FOR COUNT 1

A district court's denial of injunctive relief is reviewed for abuse of discretion. *Louis Vitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 114 (2d Cir. 2006). An abuse of discretion may be found where the district court rested "its decision on a clearly erroneous finding of fact or ma[de] an error of law." *Id.* Whether the court applied the correct legal

standard or not is reviewed *de novo*. *McDermott v. Ampersand Pub., LLC*, 595 F.3d 950, 957 (9th Cir. 2010).

A district court's denial of declaratory relief is also reviewed for abuse of discretion. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995). Errors of law constitute an abuse of discretion. *Verizon New England, Inc. v. Int'l Broth. of Elec. Workers, Local No. 2322*, 652 F.3d 176, 188 (1st Cir. 2011).

II. THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT IS PREEMPTED BY THE FEDERAL MEAT INSPECTION ACT AND THUS VIOLATES THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.

Article VI of the Constitution states 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. The FMIA explicitly pronounces 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. State law that conflicts with federal law has no effect. The APCIA does just that.

The APCIA placards are point of sale warnings that would accompany meat products, thus falling within the "labeling" requirement of the FMIA's preemption provision. Furthermore, the State law is preempted by the FMIA under two categories: express and implied preemption. The State law is expressly preempted because the warning would constitute "a requirement in addition to, or different than, the federal labeling requirements," thus violating FMIA's preemption clause. *Id.* Also, the State law is hindered by implied preemption because retailers would be unable to comply with both the State labeling requirements and the federal requirements, and the State law would frustrate the objectives and purposes of the FMIA and

attempt to regulate in a field Congress intended federal law solely to inhabit. As a result, the State law is unconstitutional for violating the Supremacy Clause.

A. THE APCIA PLACARD REQUIREMENT FALLS WITHIN THE FMIA'S PREEMPTION CLAUSE BECAUSE "LABELING" DOES NOT REQUIRE PHYSICAL ATTACHMENT AND THE PLACARD WOULD BE ACCOMPANYING THE PRODUCT.

The FMIA forbids states from requiring additional or different labeling requirements, *see id.* § 678, and "labeling" 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," *id.* § 601(p) (emphasis added). The term "point of sale warning" refers to a warning that is *not* physically attached to the product or on its container or wrapper but that is meant to be clearly visible so it would be likely read and understood by a customer viewing the product before purchase. *See* N.Y. Agric. & Mkts. Law § 1000.4.2-3. Because the APCIA placard, a point of sale warning, is not physically attached to the product, it must be considered as "accompanying" the meat or meat product to fall under the term "labeling" in order to be within the FMIA's preemption provision. The determination relies on whether labeling requires physical attachment, thus excluding point of sale warnings, and what the term "accompanying" requires.

Various sources help distinguish this case from past cases and support the conclusion that labeling does not require physical attachment and that "accompanying" requires a "textual relationship" to the product. The APCIA placard, a point of sale warning, constitutes labeling because labeling does not require physical attachment, and it has a textual relationship with the product because it is displayed with the intent of conveying a supplemental warning about the meat or meat product during the distribution of the sale. The APCIA placard is a "written, printed, or graphic matter . . . *accompanying* such article," *see* 21 U.S.C. § 601(p) (emphasis added). *See, e.g.*, *Meaunrit v. ConAgra Foods, Inc.*, No. C 09-02220 CRB, 2010 U.S. Dist.

LEXIS 73599, at *21-22 (N.D. Cal. July 20, 2010) (holding that an in-store poster was a label as defined by the FMIA); *American Meat Inst. v. Leeman*, 180 Cal. App. 4th 728, 761 (Cal. App. 4th Dist. 2009) (holding that Proposition 65's point of sale warning requirements were "labeling" within the meaning of the FMIA). Thus, the lower court was correct in its determination that the APCIA placard requirements constitute labeling, and the requirement falls within the meaning of the FMIA's preemption provision.

1. "Labeling" is broadly interpreted and does not require physical attachment.

The APCIA placard, a point of sale warning, does not need to be physically attached to be construed as a "labeling" requirement within the meaning of the FMIA's preemption provision. The statutory definition and different interpretations of the term "labeling" support the idea that labeling does not require physical attachment.

Labeling does not require physical attachment to the product. Congress incorporated the FMIA's definition of "labeling" from the Federal Food, Drug, and Cosmetic Act, ("FDCA"), 21 U.S.C. §§ 301-399(f) (2012), when it amended the FMIA through the Wholesome Meat Act. *Leeman*, 180 Cal. App. 4th at 757, fn 27. Since the definition of FMIA's definition of "labeling" was based on the FDCA, "the court may look for guidance to cases interpreting the identical language of the [FDCA] . . ." when construing the term "labeling" in the FMIA. *American Meat Inst. v. Ball*, 424 F. Supp. 758, 762 (W.D. Mich. 1976). The FDCA defines the term "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. § 321(m) (emphasis added); *see* 21 U.S.C. § 601(p), and "label" as "a display of written, printed, or graphic matter upon the immediate container of any article," 21 U.S.C. § 321(k); *see* 21 U.S.C. § 601(o).

In *Kordel v. United States*, the United States Supreme Court handled an appeal challenging a criminal conviction for introducing misbranded drugs into commerce. 335 U.S. 345 (1948). The issue was whether "circulars or pamphlets distributed to consumers" for vitamin products, which were "displayed in stores in which the . . . products were on sale" or "given away with the sale of products," established labeling within the meaning of the FDCA. *Id.* at 346-347. In *Kordel*, based on the phrase "accompanying such article," "labeling" was broadly interpreted so that "physical attachment or contiguity is unnecessary . . . ." *Id.* at 351.

However, this court has previously restricted the term "labeling" in a similar statute, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (2012). *See id.* § 136(p)(1)-(2). In *New York State Pesticide Coalition, Inc. v. Jorling*, this Court held that the notification materials, entailing cover sheets, signs, and newspaper advertisements, did not constitute "labeling" under the FIFRA because the target audience was the general public and not the user. 874 F.2d 115, 119 (2d Cir. 1989). Similarly, in *Chemical Specialties Mfrs. Ass'n v. Allenby*, the term "labeling" in FIFRA was restricted to material that will "accompany the product during the period of use." 958 F.2d 941, 946 (9th Cir. 1992). The court held that "[p]oint of sale signs are not attached to the immediate container of a product and will not accompany the product during the period of use." *Id.*

Although this court has interpreted a federal statute's labeling requirement narrowly, that interpretation is not applicable in this case. The U.S. Supreme Court has rejected a "restrictive meaning" of the term "labeling" under the FMIA. *Jones v. Rath Packing Co.*, 430 U.S. 519, 532 (1977). The FMIA's goal to protect health and welfare of consumers would mean that proper labeling would be required throughout the process from the production of meat to the consumption of it. As noted in *Leeman*, no reason is appropriate to conclude that the "FMIA's

preemption of additional or different state requirements should apply only to those materials that will remain with the product when it is being used" and that conclusion should not be imported to the FMIA. 180 Cal. App. 4th at 758. Despite the lack of physical attachment, the term "labeling" under the FMIA may include point of sale materials. *See Meaunrit*, 2010 U.S. Dist. LEXIS 73599, at *21. The definition of labeling is defined as matter "upon" or "accompanying" an article, and *Kordel* broadly interpreted "labeling" as not requiring physical attachment.

In addition, the United States Department of Agriculture, ("USDA"), has interpreted the term "labeling" to include point of sale materials or materials not physically attached. The USDA administers the FMIA, and substantial "weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). In *Leeman*, the court noted that as "reflected in a 1994 policy memorandum from the USDA and letters written by USDA officials between 1998 and 2006, the USDA has interpreted the term "labeling" as used in the FMIA to include point of sale materials since at least 1994." 180 Cal. App. 4th at 751.

In sum, the "labeling" requirement within the meaning of the FMIA preemption provision does not require physical attachment. While the State law does not require that the APCIA placard be physically attached to the meat, container or wrapper, the statutory definition and the interpretations of labeling do not exclude that it may still be classified as a labeling requirement within the meaning of the FMIA's preemption provision.

2. Close textual relationship constitutes "accompanying."

The placard's textual relationship to the product lends greater weight to the determination that the placard is accompanying the product. The approach to interpreting the term "accompanying" is important in supporting the conclusion that though not physically attached,

the APCIA placard *accompanies* the meat or meat products. Significantly, *Kordel* defined "accompanying" by stating that:

> [o]ne article or thing is *accompanied* by another when it supplements or explains it, in the manner that a committee report of the Company accompanies a bill. No physical attachment one to the one to the other is necessary. It is the textual relationship that is significant.

335 U.S. at 350 (emphasis added). The important analysis is the function of the printed material; the material would be labeling if it "was designed for use in the distribution and sale" of the product. *Id*. at 350. The reasoning in *Kordel* should be used to evaluate the APCIA placard. *But see Ball*, 424 F. Supp. at 765 (holding that *Kordel* was not applicable because it involved misbranding or misrepresentations by "manufacturers or others involved in the distribution or sales of a product."). The placard, a point of sale warning, would have a close textual relationship with the meat or meat products because it would communicate to the consumers, during the purchasing process, a supplemental warning about the product offered for sale. Thus, the APCIA placards would be accompanying the meat products and be "labeling."

Other courts have used the reasoning in *Kordel* to interpret the term "labeling." In *Leeman*, *Kordel'*s view of the term "labeling" was applied to Proposition 65, 180 Cal. App. 4th at 756-58, which required that businesses give warnings before customers were exposed to chemicals that are "known to the state to cause cancer or reproductive toxicity." *Id.* at 735 (citing Health & Saf. Code, § 25249.8 subd. (a)).The warning was to be provided "by general methods such as labels on consumer products . . . , posting of notices in public news media, and the like, provided that the warning accomplished is clear and reasonable." *Id.* at 735 (citing Health & Saf. Code, § 25249.11, subd. (f)). The court held that Proposition 65's point of sale requirements with respect to meat were labeling within the meaning of the FMIA based on the close textual relationship between the warning and the product. *Id.* at 761.

In *Meaunrit*, the court had to decide whether an in-store cardboard at a retailer promoting ConAgra's microwaveable pies constituted an advertisement or a label. *Meaunrit*, 2010 U.S. Dist. LEXIS 73599, at *21. The court looked to the plain language of the FMIA, relevant case law, and *Leeman*'s determination that *Kordel* was relevant in the analysis of determining the FMIA's definition of "labeling." Because labeling includes labels or "other written, printed or graphic matter … accompanying such article," 21 U.S.C. § 601(p), as well as circulars or pamphlets in the store, the court held that the in-store poster was a label for purposes of federal preemption. *Meaunrit*, 2010 U.S. Dist. LEXIS 73599, at *22.

The reasoning in *Kordel* was also used in the Southern District of New York to interpret the definition of labeling in another statute that has the same labeling definition as the FMIA and FDCA. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 509 F. Supp. 2d 351 (S.D.N.Y. 2007). The court held that following the broad definition of "labeling" in the FDCA, "menu, menu-boards, signs, placards, and posters would all be considered labeling of a food item" because they supplement the article. *Id*. at 360, n.13 (citing *Kordel*, 335 U.S. at 350).

Significantly, this Court in *Jorling* noted that labeling is more clearly comprehended by looking at its relationship to the product rather than how physically close it is to the product. 874 F.2d at 119. That concept is similar to the analysis encouraged by *Kordel* that the textual relationship is the important element in determining if a material is "accompanying." *Jorling* also noted that "statutory 'labeling' may include a warning." 874 F.2d at 119.

The reasoning in *Kordel* concerning the interpretation of the term "labeling" is applicable in this case and should be used because legislative history of the FMIA's preemption provisions demonstrates that Congress defined "labeling" in that provision by adopting the definition of "labeling" in the FDCA. In *Leeman,* it was noted that in 1967, "when the FMIA's preemption

provision was adopted, along with its definition of labeling (Pub.L. No. 90-201, § 408, 81 Stat. 600), *Kordel* had already broadly interpreted "labeling" to mean material that accompanies a product in the sense that it 'supplements or explains it,' but is not necessarily physically attached." 180 Cal. App. 4th 728 at 757 (citing *Kordel*, 333 U.S. at 350). Earlier case law interprets the FDCA's labeling provision; thus, if Congress wanted to adopt a more restrictive definition of labeling, it could have done so. The fact that Congress chose to adopt the same definition demonstrates its intention to include a broad interpretation of the term. The APCIA placard, or point of sale warning, would have a close textual relationship to the meat or meat products because it would communicate to the consumers, during the purchase of the product, a supplemental warning about the meat or meat product offered for sale. As a result, the APCIA placards would be accompanying the meat products and be labeling.

In sum, the statutory language and interpretations of the term labeling do not require physical attachment. Hence, the APCIA placard may still be considered a labeling requirement despite the fact it is not attached. The APCIA placard's "textual relationship" to the product also shows it is accompanying the product. The function of the APCIA placard is to act as a warning, similar to a sign affixed to a product. The APCIA placard requirements are designed to effectively communicate to consumers and the public a warning about the specific product of meat or meat products. Because the placard has a close textual relationship to the products, it is accompanying such article. As a result, the APCIA placard requirement falls within the "labeling" requirement meaning of the FMIA's preemption provision.

B. THE STATE LAW IS PREEMPTED BY BOTH EXPRESS AND IMPLIED PREEMPTION AND THUS VIOLATES THE SUPREMACY CLAUSE.

The district court ruled correctly in its determination that the APCIA placard constituted a label but erred in its decision that the State law was not preempted by the FMIA. Under the

Supremacy Clause, state law that conflicts with federal law has no effect. U.S. Const. art. VI, cl. 2. Preemption can be expressed or implied. Express preemption is when Congress can define explicitly the extent to which its enactments preempt state law; the statutory language should be explicit of federal preemption. Implied preemption applies when it is impossible to comply with both state and federal requirements, or state law hinders the purposes and objectives of Congress. Also, it applies when, absent explicit language, state law is preempted where it attempts to regulate conduct in a field that Congress intended the federal government to solely inhabit; intent may be inferred when Congress left no room for supplemental state regulation.

The State law is preempted by the FMIA by both express and implied preemption. The FMIA's preemption clause "sweeps widely." *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (U.S. 2012). Express preemption is apparent because Congress has demonstrated its obvious intent to preclude states from enacting labeling requirements that are additional or different to the FMIA. Implied preemption is also applicable because retailers would be unable to comply with the State labeling requirements and the federal requirements relating to the misbranding provision and preemption clause, and the State law frustrates the objectives and purposes of the FMIA, and attempts to regulate in a field Congress intended solely to inhabit.

1. The State law is expressly preempted.

The preemption clause expressly demonstrates Congress' intent to prevent "the States from imposing additional or different—even if nonconflicting—requirements that [fall] within the FMIA's scope." *Id.* The lower court incorrectly determined that the State law did not infringe about the territory preserved for the federal government by the FMIA's preemption clause. To determine scope of express preemption, one looks at the obvious purpose of Congress, which can be determined by the language of the pre-emption statute, the statutory framework, and structure and purpose of the statute as a whole. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996). The

APCIA placards are preempted by the FMIA because the placard requirements constitute additional or different labeling thus prohibited by Section 678. The State law falls within the scope of FMIA and thus violates the Supremacy Clause.

The intent of Congress was to create a uniform national labeling standard under the FMIA. The objective of the FMIA is to protect the markets for meat, promote consumer confidence in the safety of meat, protect the health and welfare of those consumers, and uphold the importance of proper labeling to meet those objectives. *See* 21 U.S.C. § 602. By adopting the FDCA's broad definition of labeling, interpreted by *Kordel* to include point of sale materials, Congress demonstrated its expressed intent in the FMIA's preemption clause to preclude states from enacting point of sale labeling requirements that are different from or in addition to those required by the FMIA. *See Leeman*, 180 Cal. App. 4th at 757. The APCIA placard requires labeling that is both "additional" to and "different" from federal law because the FMIA does not provide supplemental information about the effects of eating animal products on consumers' health, about the effect of animal product on the environment, or about animal handling practices. *See* N.Y. Agric. & Mkts. Law § 1000.3. The placard constitutes labeling "additional" to and "different" from that required under federal law and thus violates the Supremacy Clause.

The State law is within the scope of federal law because each is concerned about the effect the consumption of meat will have on consumer health. The FMIA requires government inspectors under the USDA to perform pre- and post-slaughter inspection of the animals intended for consumption. 21 U.S.C. §§ 603-605. Then, the meat is labeled as either "inspected and passed" or "inspected and condemned," based on whether the meat is found to be adulterated or unadulterated. *Id.* § 606. The meat labeled "inspected and passed" is determined to be safe for human consumption, and the meat labeled "inspected and condemned" is destroyed for food

purposes. *Id*. FMIA attempts to protect the health and welfare of consumers by examining the quality of the meat and distributing that information to the public through labels. The State law provides additional labeling by requiring a sign which provides supplemental information about the effect that meat, in general, can potentially have on consumer health. N.Y. Agric. & Mkts. Law § 1000.4.1. The State law is taking a broader approach to what the federal law covers.

Also, the State law is within the scope of federal law because the FMIA addresses not just the safety of meat, but the humane treatment of animals as well. *See Harris*, 132 S. Ct. at 968. The State law goal is to inform the public about the unnecessary suffering on animals, *id.* § 1000.3, and the federal law has regulations to protect the animals from needless suffering. In 1978, Congress incorporated the Humane Methods of Slaughter Act of 1958 and has since required methods of humane handling and slaughter of animals that minimize animal's pain and suffering. *Harris*, 132 S. Ct. at 968. A violation of the prescribed methods of humane handling is a crime, *see* 21 U.S.C. § 676, and the Secretary of Agriculture can suspend inspections at a slaughter house that does not follow the methods, thus shutting the facility down. *See id*. §§ 603(b), 610. In examining the State law, the real interest seems to be to inform consumers of animal suffering to indirectly attempt to stop or lower animal suffering through public reaction, but the FMIA already regulates this area. Similarly, the State law takes a broader approach concerning the effects animal agriculture and the consumption of meat have on the environment, while the FMIA attempts to regulate the production by requiring sanitary conditions. *See id*. § 608. The State is providing information on a broader level than the FMIA but is still within the scope of the FMIA.

In sum, APCIA placard warnings are "additional" and "different" from the FMIA's requirements and its comprehensive regulatory scheme. Thus, the State law falls within FMIA's

expressed preemption provision. *Id.* § 678. In all three aspects of the State law, the State is providing information on a broader level than the FMIA but is either directly within the FMIA's scope or is indirectly within the scope by aiming to cause an emotional response within consumers. The State law may provide information to the citizens through other means, but requiring the information to accompanying a product, thus an additional or different labeling requirement, is prohibited. The State law is expressly preempted by the FMIA and violates the Supremacy Clause.

2. The State law is impliedly preempted.

The State law is also blocked by implied preemption and as a result violates the Supremacy Clause. Implied conflict preemption comes from implied Congressional intent and can displace state law in different ways. The federal law impliedly preempts state law when there is a conflict of mutual compliance. *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 923, 927 (Cal. 2004). The State law can also be preempted when it frustrates or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* The lower court incorrectly determined that the placard would not breach any provision in the FMIA or cause confusion and thus was not an obstacle to the FMIA objectives. The State law breaches the misbranding provision and preemption clause, frustrates the federal purposes and objectives, and regulates in a field solely reserved for the federal government.

The State law contributes to misbranding which is prohibited by the FMIA. *See* 21 U.S.C. § 610(d). The FMIA states that meat is misbranded if, among other things, "its labeling is false or misleading . . . ." 21 U.S.C. § 601(n)(1). The federal regulations that implement the FMIA claim that:

> [n]o product or any of its wrappers, packaging, or other containers shall bear any false or misleading marking, label, or other labeling and no statement, word, picture, design, or device which conveys any false impression or gives any false

> indication of origin or quality or is otherwise false or misleading shall appear in any marking or other labeling.

9 C.F.R. § 317.8(a) (2012). The placard would mislead the typical consumer into believing that though the meat had passed federal inspection and was hence unadulterated, it is otherwise not fit for human consumption. *See* 21 U.S.C. § 606. In addition, it gives consumers a false impression that the process in the production of meat does not contain protection for animals; but Congress incorporated the Humane Methods of Slaughter Act of 1958 and has since required methods of humane handling and slaughter of animals that minimize animal's pain and suffering. Misleading and giving a false impression constitute "misbranding" under the law. Complying with the State law would require retailers to breach the prohibition on misbranding under federal law.

Federal law impliedly preempts state law when mutual compliance would be impossible because of a danger of legal sanctions. *Dowhal*, 32 Cal. 4th at 923, 927. The retailers may use the label required by the FMIA and not apply the labeling requirements of the State law and risk a penalty of a "fine of $1,000 per day." N.Y. Agric. & Mkts. Law § 1000.5. The second option for retailers is to use the label required by the FMIA and to have a APCIA placard accompanying its products in plain violation of the FMIA preemption clause and misbranding provision and risk possible sanctions or warning, 21 U.S.C. § 676; *see Dowhal* 32 Cal. 4th at 927-929 (noting that the warning was "misleading" which constitutes "misbranded as a matter of law;" thus, Proposition 65 was preempted based on impossibility of dual compliance, notwithstanding the absence of an affirmative threat or initiation of a misbranding action by the FDA).

The FMIA's purpose is to benefit and ensure the consumer's health and welfare and to allow the consumer to have a correct understanding of and confidence in meat or meat products. Congress noted that it "was essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are

wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602. Meat labeled "passed" has been determined to be unadulterated and safe for human consumption; but the State law warning that chronic disease can be largely prevented by staying away from eating meat would conflict with federal objectives by confusing and undermining consumer confidence in federally inspected meat. Also, by providing other supplemental information, the State law could mislead consumers into believing that the product is not safe and that there is a lack of regulation in the production of meat.

If the court finds an absence of explicit language to preempt state law, the intent of Congress to solely inhabit the area of labeling requirements for animal production may be inferred because Congress left no room for supplemental state regulation. The FMIA's labeling preemption provision shows the intent of Congress to create a uniform national labeling standard to achieve those objectives. *See id.* § 678. While a state may take "concurrent action" under FMIA § 678, the requirements must be consistent with FMIA to guarantee uniform national regulation and labeling of meat. *Id.* One such requirement is that states cannot require "additional or different" labeling, *id.*, thus, not leaving room for supplemental state regulation in that matter. As a result, the State law encroaches in an area reserved for regulation under the federal government and violates the Supremacy Clause.

In sum, the State law would require retailers to breach the misbranding provision. Notably, since the warning is telling consumers that avoiding the consumption of the meat can largely prevent chronic disease, it misleads consumers into believing that the quality of the meat or meat product is not fit for human consumption. It also gives a false impression that there is no regulation on the humane treatment of animals because the warning states that animals are exposed to unnecessary suffering. *See* N.Y. Agric. & Mkts. Law § 1000.4.1. The retailers will be

unable to follow the FMIA and State law because they risk going against the FMIA's preemption clause on the one hand or breaking the State law on the other. Also, the State law frustrates the federal purposes and objectives of promoting consumer confidence in the safety of meat. In addition, the State law attempts to regulate in a field reserved for the federal government.

Moreover, express and implied preemption are independent grounds for determining the preemption of state law, and each blocks the State law from becoming effective.

Conclusion

The statutory language and interpretations of the term "labeling" do not require physical attachment, thus including point of sale materials; however, the material must "accompany" the product. The analysis in *Kordel*, promoting the concept of looking at the textual relationship between the material and product, should be used to determine if the APCIA placard is accompanying the meat or meat products. Consequently, the APCIA placard requirements are designed to effectively convey to consumers a warning about the specific product of meat or meat products. The APCIA placard has a textual relationship to the products; hence, it is accompanying such article and consequently a label. The APCIA placard requirement falls within the "labeling" requirement meaning of the FMIA's preemption provision.

The State law labeling requirements are preempted by both express and implied preemption. Each is an independent ground for prohibiting the State law. Express preemption is apparent because Congress has demonstrated its obvious intent, through the preemption clause, to preclude states from enacting labeling requirements that are additional or different to the FMIA. Implied preemption is also applicable because retailers will be unable to comply with the State labeling requirements and the federal requirements relating to the misbranding provision and preemption clause. In addition, the State law frustrates the federal purposes and objectives of

protecting the market for meat and promoting consumer confidence in the safety of meat and attempts to regulate in a field that Congress implicitly reserved for the federal government. Express and implied preemption block the State law from becoming effective.

The APCIA placard requirement constitutes labeling, and the State law is preempted by the FMIA. As a result, the APCIA is preempted by the FMIA and thus unconstitutional for violating the Supremacy Clause.

III. STANDARD OF REVIEW FOR COUNT 2

An appellate court reviews a district court's grant of summary judgment *de novo*. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 46 (2d Cir. 2007). A court should employ the same standard in reviewing a motion for summary judgment as the district court does: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012). A court may find that "[a] genuine issue of material fact exists where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Southold*, 477 F.3d at 46 (quoting *Anderson v. Liberty Lobby, Inc.*, 466 U.S. 242, 249 (1986)). When an appellate court reviews the record to determine whether there is a genuine issue of material fact, the court reviews the evidence in "the light most favorable to the non-moving party, drawing all reasonable inferences and resolving all ambiguities in its favor." *Id.*

IV. THE DISTRICT COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE THE APCIA VIOLATES THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

The Commerce Clause grants the power to Congress "[t]o regulate Commerce with foreign Nations, and among the several states." U.S. Const. art. I, § 8, cl. 3. The Framers of the

Constitution recognized that "in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). Although the Constitution itself does not expressly limit the power of states to regulate commerce, the Court has "long interpreted the Commerce Clause as an implicit restraint on state authority." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). This aspect of the Commerce Clause is referred to as the "dormant" Commerce Clause. *Id.*

A dormant commerce Clause analysis of a state statute "proceeds on two tiers, a discrimination tier and an undue burden tier." *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005). If a court finds that the statute discriminates against interstate commerce on its face, or through its practical effects, *Hughes*, 441 U.S. at 325, the statute is *per se* invalid and will only survive if it can pass strict scrutiny—i.e., the state must show that the law advances "a legitimate local purpose that cannot be adequately served by reasonable, nondiscriminatory alternatives." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Or.*, 511 U.S. 93, 100-01 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)). If a court instead finds that a statute regulates "even-handedly," with only incidental effects on interstate commerce, then the statute will be upheld "unless the burden imposed on interstate commerce is clearly excessive in relation to its local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); this part of the analysis is what is now commonly referred to as the "*Pike* balancing test." *Oregon Waste*, 511 U.S. at 99-101.

In this case, the APCIA is unconstitutional under both tiers of analysis. The APCIA's placard requirement is unconstitutional because it is discriminatory in its effects and does not

pass strict scrutiny. Alternatively, the placard requirement is unconstitutional because its effects on interstate commerce are clearly excessive in relation to its local benefits and hence does not pass the *Pike* balancing test. Because it fails regardless of which tier it is analyzed under, the district court's ruling on this count, granting summary judgment, must be affirmed.

A. THE APCIA EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE BECAUSE IT IS DISCRIMINATORY IN ITS EFFECTS ON INTERSTATE COMMERCE AND IT DOES NOT SURVIVE STRICT SCRUTINY.

1. The State law is discriminatory in its practical effects.

The APCIA is discriminatory in its effects because of the placard's impact on interstate commerce. Although the NMPA concedes that the APCIA is not discriminatory on its face, it is, however, discriminatory in its practical effect on interstate commerce. Discriminatory, in this sense, is defined as "differential treatment of in-state and out of-state economic interests that benefits the former and burdens the latter." *Oregon Waste*, 511 U.S. at 99. The Supreme Court has found that a statute discriminates against interstate commerce when it raises out-of-state business' costs of doing business in the state, while having no effect on in-state business' costs of doing business in the state. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350-51 (1977). In *Hunt*, apple containers coming into the State of North Carolina could bear a label or stamp with only the "applicable USDA grade" or no label at all. *Id.* at 337. Washington apple growers employed their own grading system stamped on their apple containers and would incur enormous expense in complying with the statute. *Id.* at 338. Although the statute on its face did not discriminate against interstate commerce because it required one uniform standard of labeling, it did so in its effect.

However, the Court has held that a statute is not discriminatory in its effects when it does not: (1) create any "barriers whatsoever against independent dealers," (2) "prohibit the flow of

interstate goods, (3) "place added costs upon" interstate dealers, or (4) "distinguish between in-state and out-of-state companies in the retail market." *Exxon Corp., v. Governor of Maryland*, 437 U.S. 117, 126 (1978). In *Exxon*, the State of Maryland passed a law prohibiting producers or refiners of petroleum products from operating retail gas stations in the state. *Id.* at 119. The law also required the companies to extend any price reduction it granted to one station to all stations the company supplied. *Id.* at 119-23. The Court found no discrimination because interstate dealers who did not produce or refine petroleum were not affected by the Act. *Id*. at 126. In addition, there were no in-state producers or refiners and hence, there was no way to treat in-state and out-of-state interests differently. *Id.* at 125.

Like *Hunt*, the APCIA discriminates against interstate commerce when it directs consumers to a website that lists only State approved farms, essentially placing the State stamp-of-approval on the farms. This government endorsement will result in out-of-state processors losing money as State consumers start buying only locally processed meat based on the belief that State farms are the only ones processing meat in a humane and environmentally sustainable manner. This government endorsement will also cause out-of-state processors to spend massive amounts of money on advertising in the State to combat this misplaced consumer reliance. All of this amounts to lost profits and increased costs for out-of-state processors to do business in the State, while imposing little if any costs on in-state processors. In-state processors may actually benefit in two ways: First, the State is providing them with free advertising, thus saving in-state processors money; and second, the State is promoting these in-state farms and essentially sending business in their direction, thus increasing in-state processor profits.

This case is unlike the *Exxon* case, where interstate, independent dealers were simply facing the prospect of their business shifting to other interstate dealers. *Exxon*, 437 U.S. at 126.

Here, the State's farm endorsements affect an entire industry and any processor who is not located within the State. Also unlike *Exxon*, the APCIA distinguishes between in-state and out-of-state companies in the retail market because the only approved farms are located within the State, excluding approval of any farm not in the State. The placard requirement is exactly the type of law affecting "the interstate market, not [just] particular interstate firms, from prohibitive or burdensome regulations" that the Commerce Clause was designed to protect against. *Id.*

2. A statute that is discriminatory is *per se* invalid and must undergo strict scrutiny analysis.

The APCIA is *per se* invalid and does not survive strict scrutiny analysis. The Court has held that "once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,'" that it is subject to strict scrutiny analysis. *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes*, 441 U.S. at 336); *see also Southold*, 477 F.3d at 47-48. Once a court finds a statute to be discriminatory, the burden shifts to the state to prove that the statute serves a legitimate local purpose and that such purpose cannot be adequately served by reasonable, nondiscriminatory alternatives. *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951).

Had the district court not granted the NMPA's motion for summary judgment, the court concededly may have found that the State has a legitimate local purpose. In enacting the APCIA, the State has asserted it was aiming to reduce both healthcare and environmental costs to the state and to promote the humane treatment of animals, all by encouraging consumer education. Op. at 3. Yet, the district court would have been hard-pressed to find that such purposes could not have been accomplished by reasonable, nondiscriminatory alternatives. Indeed, the State has at least two options that would accomplish the statute's purposes: the State could have included names of farms across the Nation rather than limiting its list to in-state farms, or the State could

have omitted any type of listings, thus avoiding the extra expense the State complained it would incur had it posted other states' farms.

This case is unlike the situation in *Maine*, where the Court held that a statute served a "legitimate local purpose that could not be adequately served by available nondiscriminatory alternatives." 477 U.S. at 151. In that case, a statute prohibited importing live bait fish into Maine in effort to "protect[] the State's fisheries from parasites and nonnative species that might be included in shipments of live baitfish." *Id.* at 132-33. The alternative to this ban was to test each shipment for parasites and nonnative species. *Id.* at 141. However, the "small size of [the] baitfish and the large quantities in which they were shipped" would make inspection severely cumbersome if not "physically impossibl[e]." *Id.* Accordingly, the Court reinstated the lower court's finding that the ban was the only way to accomplish the state's purpose. *Id.* at 143.

This case is more like the situation in *Dean Milk*, where the Court held that the City of Madison, Wisconsin had reasonable alternatives to accomplish its goals of protecting the public's health and conserving the energies of the city's two milk inspectors. *Dean Milk*, 340 U.S. at 351. Instead, Madison chose to simply outlaw the sale of milk within the city that was not processed and bottled within 5 miles of the city, or that did not come from a source within 25 miles of the city. *Id.* The Court held that Madison could "charge the actual and reasonable cost of such inspection to the importing producers and processors." *Id.* at 355. Or, rather than providing a geographical restriction, the Court stated that the city could simply exclude "from the municipality milk not produced and pasteurized conformably to standards as high as those enforced by the receiving city." *Id.*

Here, the State has two very reasonable, nondiscriminatory alternatives to the website listings that would serve to accomplish the State's goals of educating the public while not

discriminating against other states. *See also Hughes*, 441 U.S. at 337-38 (holding that "far from choosing the least discriminatory alternative, Oklahoma has chosen to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce.").

B. ALTERNATIVELY, THE APCIA EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE BECAUSE IT IMPOSES AN UNDUE BURDEN ON INTERSTATE COMMERCE.

A *Pike* analysis is reserved for non-discriminatory statutes which regulate evenhandedly, meaning that the statute treats in-state interests the same as out-of-state interests. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981). Even if such a statute has incidental effects on interstate commerce, it will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. If the statute serves a legitimate local purpose and the court finds that there is no less discriminatory means of accomplishing this purpose, the statute will usually be upheld. But if the statute imposes a clearly excessive burden and the court finds that there are less discriminatory ways of accomplishing the state interest, then the statute is unconstitutional and cannot stand. In this case, the State's website listings impose a clearly excessive burden on interstate commerce in relation to the weak local benefits the listings provide, and thus does not pass Constitutional muster.

1. The State law, at a minimum, imposes an incidental burden.

As a threshold matter, a court must find that a statute actually imposes a burden on interstate commerce. An incidental burden is found where "burdens on interstate commerce [] exceed the burdens on intrastate commerce." *Gary D. Peake Excavating Inc., v. Town Bd. of Town of Hancock*, 93 F.3d 68, 75 (2d Cir. 1996) (internal quotations omitted). In *Peake*, this Court did not find an incidental burden where the town did not treat in-state waste any differently than out-of-state waste. *Id.* at 76. And this Court failed to find an incidental burden when the

statute did not "impose any different burdens on nonlocal as opposed to local garbage haulers." *USA Recycling, Inc., v. Town of Babylon*, 66 F.3d 1272, 1287 (2d Cir. 1995).

Here, the placard requirement imposes a burden on interstate commerce that exceeds the burden on intrastate commerce. In fact, the entire burden falls on interstate commerce while intrastate commerce is actually benefitting from saving money on advertising, and profiting from the State's promotion of its farms. This case is distinct from *Peake* and *USA Recycling* because the website does not include any out-of-state farms on its "approved" list. Op. at 4. The NMPA cannot offer actual proof of lost profits or increased advertising costs. However, a court may consider both potential lost profits and potential effects when the data is not available, such as when a law has recently taken effect or has not yet taken effect. *Pharm. Research and Mfrs. Of Am. v. Concannon*, 249 F.3d 66, 84 (1st Cir. 2001) ("We are forced to balance the *possible* effects, instead of the actual effects of the statute in action.") (emphasis in original). Thus, considering potential lost profits and effects, the threshold of finding an incidental burden is easily reached in this case.

2. The State law imposes a clearly excessive burden.

Once an incidental burden is established, a "clearly excessive" finding typically turns more upon "the nature of the local interest involved, and on whether it could be promoted with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. Only rarely has a court declined to find that a disputed statute serves a legitimate local purpose. *See generally Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Va.*, 985 F.2d 164, 167 (4th Cir. 1993) (finding the statute's asserted purpose of restricting competition to avoid monopolization of the market to be "entirely speculative.").

Statutes impose an undue burden on interstate commerce where "the nature of [the] burden, is, constitutionally, more significant than its extent." *Pike*, 397 U.S. at 145. Where a

reciprocity clause in effect excluded Louisiana milk from being distributed in Mississippi, the Court found that the nature of the local interest was clearly excessive in relation to the local benefits. *Great Atlantic & Pac. Tea Co., Inc., v. Cottrell*, 424 U.S. 366, 375-76 (1976).

And even when the nature of the local interest is important, the availability of less discriminatory alternatives decides the statute's fate. A statute has been upheld when the alternatives to furthering the town's interests of "promoting resource conservation, eas[ing] solid waste disposal problems, and conserv[ing] energy" would either be more burdensome on commerce or less likely to be effective. *Clover Leaf*, 449 U.S. at 473. But in cases where there are reasonable alternatives that are less restrictive, a statute's burdens outweigh its benefits. *See Yamaha*, 401 F.3d at 573.

Like *Great Atlantic*, the nature of the burden in this case is clearly excessive to the local benefits. Admittedly, the burden in this case does not rise to the same level as that in *Great Atlantic*. Nevertheless, the burden is still excessive when compared with the benefits. The APCIA does little if anything to promote the State's interest, and may even be disserving the interest by posting a list with arbitrary approval standards. The State does not list the standards it uses to determine whether a farm is environmentally sustainable or whether it treats its animals humanely. Thus, rather than informing their consumers, the State may actually be misleading them, bestowing little if any benefit to State consumers.

Moreover, the APCIA listings can in effect exclude meat processed outside of the State from being sold within the State as consumers elect to purchase their meat from only State-approved farms. And finally, the State has several reasonable and nondiscriminatory alternatives to achieve the goals of the APCIA that would result in significantly lesser impact on interstate commerce.

Conclusion

In summary, courts overwhelmingly strike down state laws that discriminate against interstate commerce where there are less discriminatory alternatives available. Here, this Court is faced with "a regulation not essential for the protection of local health interests [which] plac[es] a discriminatory burden on interstate commerce." *Dean Milk*, 340 U.S. at 356. Like the situation in *Dean Milk*, the regulation here must also "yield to the principle that 'one state in its dealings with another may not place itself in a position of economic isolation.'" *Id.* (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)). The goals here are laudable; but when they can be accomplished by other reasonable, nondiscriminatory means, the statute must be struck down.

Furthermore, the APCIA's placard requirement imposes an undue burden on interstate commerce. By posting a list of only in-state farms, the State treats in-state interests vastly different than out-of-state interests. The nature of this burden is more significant than its extent. This burden could possibly be overlooked if the website listings were the only way to achieve consumer education regarding environmental sustainability and the humane treatment of animals. But where there are less discriminatory alternatives available, as in this case, then the statute cannot survive even the more permissive *Pike* balancing test.

CONCLUSION

For the foregoing reasons, the NMPA respectfully requests that this Court REVERSES the district court's judgment as to Count 1. Additionally, the NMPA respectfully requests that this Court AFFIRM the district court's judgment as to Count 2.