NO. 11-55440

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NATIONAL MEAT PRODUCERS ASSOCIATION,

Respondent,

V.

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

Appellant.

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

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# BRIEF FOR APPELLANT

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Competition Team Number 8

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## STATEMENT OF ISSUES PRESENTED

1. Is the Animal Products Consumer Information Act, which requires a point of sale notification, preempted by the Federal Meat Inspection Act?

2. Is the Animal Products Consumer Information Act, which promotes human health, animal welfare and environmental sustainability, an impermissible violation of the dormant Commerce Clause?

## STATEMENT OF THE CASE

The National Meat Producers Association ("NMPA") filed a complaint in the United States District Court for the Southern District of New York to enjoin and declare the Animal Products Consumer Information Act ("APCIA") as unconstitutional. NMPA claimed that the APCIA was (1) preempted by the Federal Meat Inspection Act ("FMIA") and (2) a violation of the dormant Commerce Cause. The NMPA moved for summary judgment on both claims. On September 15, 2012, the District Court held that the APCIA was not expressly or impliedly preempted by the FMIA and that "a consumer has the right to be informed of the nature and substance of the food he or she ingests." *Nat'l Meat Producers Ass'n v. Comm. of N.Y. Dept. of Agric. and Mkts.*, No. CV 11-55440, 17 (Southern D. N.Y. Sept. 15, 2012) ("Mem. Op."). The District Court granted NMPA's motion on the basis that the APCIA unduly burdened interstate commerce in violation of the Commerce Clause. The New York Department of Agriculture now appeals to this Court the District Court's grant of NMPA's Motion for Summary Judgment.

## STATEMENT OF FACTS

Diets that consist of animal-based products have been linked to heart disease, cancer, type 2 diabetes, autoimmune diseases, stroke, hypertension, decreased bone and kidney health, brain disorders like Alzheimer's, and infectious diseases. R. at 4-5. The link between an animal-based diet and these diseases is so strong that Dr. Colin Campbell remarked that "[m]ore people die because of the way they eat than by tobacco use, accidents or any other lifestyle or

environmental factor." R. at 4-5. Fortunately, most of these diseases can be prevented, and in fact reversed, with a plant-based diet and reduced consumption of animal products. R. at 4-5. The simple fact is that a change in diet can reduce the instances of these diseases and "lead to a reduction in the costs of health, both for individuals and for the State of New York." R. at 4. This is a message that is "soundly based on [a] breadth and depth of scientific evidence." R. at 5. As a result of significant industry influence, this message has been prevented from reaching the American public.

*New York's Protection of the Consumer*

The lawmakers in New York heard this message about the negative health impacts of animal food products while exploring ways to address considerable budget constraints. The state formed the Long-Term Reduction of Government Costs Without Cutting Benefits Committee (the "Committee") to determine how New York could reduce its operating costs. R. at 3. The Committee "heard over 1,000 hours of expert testimony, mainly focused on health care and the environment." R. at 3. This expert testimony led to over 500 different cost-saving recommendations. R. at 3. Of these recommendations, 20 called for new regulations on the animal agriculture industry. R. at 3. Ultimately, the Committee paired down the suggested cost-saving measures and recommended that the state legislature "encourage the reduction of the public's consumption of animal products." R. at 3.

The Committee's recommendation was based on the countless testimony that detailed the financial, human, and environmental costs associated with animal agriculture. First, the financial impact on the state from the effects of animal production was significant. For example, *Salmonella* contaminated food products cost approximately $2.5 billion per year. R. at 6. The

contamination associated with New York's dairy and hog concentrated area feeding operations ("CAFOs") are projected to cost the state an estimated $56 million. R. at 9.

Second, the testimony also revealed that the treatment of livestock directly impacts human health. R. at 8. Animals raised in intense, confined conditions are more susceptible to disease and infection. R. at 8. A growing number of these diseases are communicable and deadly to humans. R. at 8. In fact, the American public health community agrees that intensive animal confinement poses "unacceptable" risks to human health. R. at 8. Third, the evidence also established that animal agriculture, specifically CAFOs produce negative effects on the environment. These include significant threats to air and water quality. R. at 10.

When submitting their recommendation and the evidence to the New York lawmakers, the Committee also provided several studies that "demonstrated that better educated consumers buy products that are environmentally friendly, healthy, and do not involve animal cruelty." R. at 3. Armed with the wealth of evidence from the Committee, the New York legislature enacted the Animal Products Consumer Information Act ("APCIA") N.Y. AGRIC. & MKTS. LAW § 1000 (2012). This statute embodied Dr. Campbell's simple message; "[t]here is nothing better the government could do . . . than telling Americans unequivocally to eat less animal products." R. at 5.

The APCIA is a two-page statute "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 statute requires all New York state retailers to display a placard wherever animal products intended for human consumption are offered for sale. N.Y. AGRIC. & MKTS. LAW § 1000.4.1. It defines animal

products as "meat, fish, dairy, and eggs." N.Y. AGRIC. & MKTS. LAW § 1000.2. The required placard must state:

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

N.Y. AGRIC. & MKTS. LAW § 4. The state-sponsored web site referenced on the placard, www.informedchoice.ny.gov ("the Site"), provides comprehensive information on the adverse human health, environmental, and animal welfare impacts of eating animal products. R. at 3. The Site also includes a list of New York farms determined by the state to meet environmental and animal welfare standards. *Id.*

*The Federal Government's Protection of the Consumer*

While the APCIA was enacted on the premise that a well-informed consumer purchases healthier products, the Federal Meat Inspection Act ("FMIA") was enacted for the purpose of preventing unwholesome, adulterated, or misbranded meat from entering the countries food supply. 21 U.S.C. § 602 (2012). The FMIA creates a regulatory scheme that inspects slaughtering facilities engaged in interstate commerce to ensure that all meat from those facilities intended for human consumption is "wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602 (2012).

The FMIA was originally enacted in 1907 and has been amended multiple times. 21 U.S.C. §§ 601-695 (2012). In January 1963, the USDA commissioned the Clarkson Report. *Bills to Clarify and Otherwise Amend the Meat Inspection Act: Hearing before the Subcomm. of the Comm. on Agriculture and Forestry*, 90th Cong. 210 (1967) (statement of Mrs. Sylvia Zagoria,

National Consumers League). The Clarkson Report was a 49-state survey of slaughterhouses and meat producers not governed by the FMIA in place at the time. *Id*. The report detailed that in "virtually every jurisdiction" there were countless instances of "unsanitary meat, unwholesome meat, unsanitary packing conditions . . . and . . . misleading labeling." *Meat Inspection: Subcomm. of the Comm. on Agriculture and Forestry*, 90th Cong. 80 (Nov. 9, 10, 14, and 15, 1967) (statement of Rodney Leonard, Deputy Assistant Secretary, Consumer and Marketing Services, U.S. Dept. of Agriculture).

As soon as the Clarkson Report was released to the public it "caused a national scandal." 104 Cong. Rec. H 4449-50 (daily ed. May 29, 1958) (statement of Mr. Dole). In fact, the public was so shocked that "for months butchers reported difficulty in selling meat without the 'USDA Inspected' label." *Id*. The public, Congress, and the USDA all agreed that it was "abundantly clear that the current system of relying upon a patchwork of federal and state" laws had not provided the consumer with an effective system of ensuring that meat products were not adulterated and were properly labeled. *Bills to Clarify and Otherwise Amend the Meat Inspection Act: Hearing before the Subcomm. of the Comm. on Agriculture and Forestry*, 90th Cong. 211 (1967) (statement of Mrs. Sylvia Zagoria, National Consumers League).

As a result, the FMIA was amended in 1967 to address the shortcomings highlighted by the Clarkson Report. One of the amendments to the Act included the express pre-emption provision that prevented individual states from enacting "[m]arking, labeling, packaging, or ingredient requirements" that are "in addition to, or different than" those imposed by the Act "with respect to articles prepared at any establishment under inspection." 21 U.S.C. § 678 (2012). Despite this express prohibition on certain state regulation, the Act allows states to make

requirements and take other action "consistent with" the FMIA "with respect to any other matter regulated under the Act. 21 U.S.C. § 678 (2012).

Throughout the process of amending the FMIA to standardize inspection and labeling under a single federal regime, Congress repeatedly explained that the purpose of the labeling provisions was to "eliminate numerous opportunities now present to defraud consumers and endanger public health." *Meat Inspection: Subcomm. of the Comm. on Agriculture and Forestry*, 90th Cong. 38 (Nov. 9, 10, 14, and 15, 1967) (statement of Hon. Hubert Humphrey). The new labeling provisions in the FMIA gave the USDA authority "to regulate the marking, labeling, and packaging of articles specified in the bill, to prevent the use of false, deceptive or misleading marks, labels, or containers." *Id*. at 45. The USDA, the expert agency, agreed with congressional sentiment that "uniformity of labeling requirements" eliminates the "opportunities for fraud and deceit." *Id*. at 64 (statement of Rodney Leonard, Deputy Assistant Secretary, Consumer and Marketing Services, U.S. Dept. of Agriculture).

Ultimately, Congress and the USDA wanted to ensure that the consumer could buy meat with "confidence in its wholesomeness" and this confidence is "maintained and supported by effective regulation and inspection of the production of all meat to prevent adulteration and misbranding." *Id*. at 66 (statement of Rodney Leonard).

## STANDARD OF REVIEW

The court reviews the district court's grant of summary judgment de novo. *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220 (2d Cir. 2008).

## SUMMARY OF ARGUMENT

The average consumer's purchasing decisions are based on information either (1) mandatorily disclosed because of state or federal law or (2) voluntarily disclosed, usually as part

of the manufacturer's marketing scheme. The National Meat Producers Association ("NMPA") wants to minimize the amount of harmful information that it is required to disclose by law. The consumer, however, is only able to make environmentally sound, healthy, and animal friendly choices if more information is disclosed. The growing tension between the illusive meat industry and the compassionate consumer is at the heart of this case.

The State of New York threw its weight behind the consumer's desire for more information with the Animal Products Consumer Information Act ("APCIA"). The NMPA's arguments for why the APCIA is unconstitutional are veiled attempts to categorically prohibit the consumer from accessing information about the negative environmental, health, and animal welfare effects of the animal industry. For the meat industry, transparency hurts business. The Court should reject these attempts to shelter the consumer from the important message disclosed by the New York Law for the following two reasons.

First of all, the APCIA is not expressly or impliedly preempted by the Federal Meat Inspection Act ("FMIA"). By applying the presumption against preemption, Second Circuit precedent, and legislative history it is evident that the express preemption of labeling in the FMIA does not extend to point of sale notifications. The APCIA is a broad and generalized warning aimed at the public at large, not an individual consumer. As such it is a point of sale warning, not an expressly preempted label. Moreover, the requirements of the APCIA do not conflict with the requirements or the objectives of the FMIA. This Court should affirm the District Court finding that the APCIA and the FMIA can coexist.

Second, the APCIA does not unduly burden the dormant Commerce Clause. The APCIA is a facially neutral statute that does not in its effect burden out-of-state competitors to the benefit of those in-state. Rather, the APCIA treats in-state and out-of-state animal agriculture exactly the

same. Any burden that the APCIA may place on interstate commerce is de minimis. This is because the APCIA is simply an informational statute that does not impose any restrictions on the flow of animal products across state lines. New York's concern for the health of its citizens, environment, and animals is legitimate. This interest is advanced by the public interest warning required under the APCIA because the record establishes that a better educated consumer buys products that are environmentally friendly, healthy, and do not involve animal cruelty. Despite the lower court's suggestion, there is no evidence that the state's intent to protect the health and welfare of its citizens could be promoted with any less of a burden on interstate commerce.

In light of these two reasons this Court to reverse the lower court's grant of summary judgment in favor of the NMPA. Instead, this Court should enter judgment for New York Department of Agriculture, holding that the APCIA is (1) not preempted by the FMIA and (2) not an undue burden on interstate commerce.

## ARGUMENT

### I. THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT IS NOT PREEMPTED BY THE FEDERAL MEAT INSPECTION ACT BECAUSE IT IS A POINT OF SALE WARNING THAT DOES NOT CONFLICT WITH THE FEDERAL LAW.

The Supremacy Clause of the Constitution provides that federal law "shall be the supreme Law of the Land." U.S. CONST. art. VI. As a result, whenever a state law "interferes with or is contrary to the federal law," the state law must yield. *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). The National Meat Producers Association ("NMPA") would prefer if all state laws that provide consumers health information about animal products, like New York's Animal Products Consumer Information Act ("APCIA"), were preempted by the Federal Meat Inspection Act ("FMIA"). However, a state law can be preempted in only two

ways; (1) expressly or (2) impliedly. *Id*. at 98. As the District Court properly held, the APCIA is not expressly or impliedly preempted by the FMIA. As a result, the State of New York does not have to cede to the industry's persistent attempts to silence the message that "[m]any chronic diseases, including heart disease, can largely be prevented and, in many cases reversed by avoiding the consumption of animal products." N.Y. AGRIC. & MKTS. LAW § 1000.4.1.

A. The presumption against preemption applies and demands a narrow reading of the FMIA .

Any preemption analysis, whether express or implied, begins with "the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Grp. Inc. v. Good*, 555 U.S. 70, 543 (2008) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)). This presumption is based on the long standing recognition that "[s]tates are independent sovereigns in our federal system" and that "Congress does not cavalierly pre-empt state law." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). This presumption demands that if the federal statute "is susceptible of more than one plausible reading" then the Court should 'accept the reading that disfavors pre-emption.'" *Altria Grp.*, 555 U.S. at 543 (citing *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431 (2005)).

The presumption against preemption is strongest in those cases where Congress legislated "in a field which the States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Supreme Court has recognized that the presumption applies in the context of the FMIA, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), as the regulation of public health and safety "is primarily, and historically, a matter of local concern." *Hillsborough Cnty. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 719 (1985). As such, the federal government traditionally grants states "great latitude under their police powers" to legislate for the protection of the health of its citizens. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S.

724, 756 (1985). This Circuit goes even further by assuming "that state and local regulation related to matters [of public health and safety] . . . can normally coexist with federal regulations." *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009).

The APCIA is a state regulation aimed at protecting the health and safety of New York citizens. The APCIA's purpose states that it was "designed to protect the citizens" of New York by providing information about the negative health impacts of animal agriculture. N.Y. AGRIC. & MKTS. LAW § 1000.3. Indeed, the statute was enacted after the state legislature heard "over 1,000 hours of expert testimony" regarding healthcare, including the negative health impacts of an animal-based diet. Mem. Op. at 3. The public health purpose of the APCIA is even evident by the statute's required public interest warning, which states that "[m]any 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." N.Y. AGRIC. & MKTS. LAW § 1000.4.1.

The APCIA is undoubtedly a public health and safety statute, which is a valid exercise of traditional state police power. As such, this Court should assume that the APCIA can coexist with the FMIA. This requires that if the FMIA "is susceptible of more than one plausible reading" then the Court should "accept the reading that disfavors pre-emption." *Altria Grp.*, 555 U.S. at 543.

B. <u>The APCIA is not expressly preempted because it is a point of sale warning, not a marking, labeling, packaging, or ingredient requirement.</u>

*1. The FMIA preempts state laws regarding material "accompanying" a product but that preemption does not extend to point of sale notices.*

The mere existence of an express preemption provision in the FMIA is not dispositive. In the presence of such an express provision, the Court must determine the "substance and scope of

Congress' displacement of state law." *Altria Grp.*, 555 U.S. at 543. In determining the "substance and scope," the Court is "guided by the rule that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Id*. (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The "plain wording of [the express pre-emption] clause . . . contains the best evidence of Congress' preemptive intent."[1] *Chamber of Commerce of United States v. Whiting*, ___ U.S. ____, 131 S.Ct. 1968 (2011). The court should consider the plain language of a statute in light of "its general purposes and the evils which it sought to remedy." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625 (1935).

The FMIA expressly prohibits states from imposing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those" made under the Act. 21 U.S.C. § 678. The FMIA defines a "label" as "a display of written, printed, or graphic matter upon the immediate container . . . of any article." 21 U.S.C. § 601 (o). The term "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." 21 U.S.C. § 601 (p). This definition of "labeling" in the FMIA is identical with that in the Federal Food, Drug, and Cosmetic Act ("FD&C Act"), (21 U.S.C. § 201(m) (2012), and in the Federal Insecticide, Fungicide & Rodenticide Act ("FIFRA"). 7 U.S.C. § 136(p) (2012). As a result, case law interpreting the labeling provisions of the FD&C Act and FIFRA are relevant to the court's analysis. *See e.g.*, *American Airlines v. North American Airlines*, 351 U.S. 79, 82 (1956) (stating that the court may look to cases interpreting the identical language in an earlier statute for guidance).

The plain language of the FMIA makes clear that any material physically attached to the product is considered a "label." The plain language also makes clear that the provision extends

[1] The Supreme Court's recent decision in *Nat'l Meat Ass'n v. Harris* is not applicable to this case because it only addresses the clause in the express preemption provision regarding the slaughterhouse "premises, facilities and operations." __ U.S. __, 132 S.Ct. 965, 970 (2012).

further to materials not physically attached, but "accompanying" the product. However, the statute does not define "accompanying." The Supreme Court in *Kordel v. United States* defined the term within the context of the FD&C Act. 335 U.S. 345 (1948). In *Kordel*, the Court held 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 Congress accompanies a bill." *Id*. at 350.

Consistent with the *Kordel* definition, the Second Circuit has not interpreted "accompanying" strictly. Rather, this Circuit has expressly declined on multiple occasions to extend the labeling definition to reach notifications provided by retailers at the point of sale. *N.Y. State Pesticide Coal. Inc. v. Jorling*, 874 F.2d 115, 120 (2d Cir. 1989); *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, 1004-1005 (2d Cir. 1985).

In *Jorling*, this Court held that notifications "designed to warn the public at large . . . do not constitute preempted 'labeling'" under FIFRA. *Jorling*, 874 F.2d at 120. In reaching this narrow interpretation of "accompanying," the Court emphasized that "interpreting 'accompanies' strictly in terms of physical presence would result in clearly extraneous material such as the logo on the applicator's hat and the license plate on the vehicle in which the pesticide is transported being considered labeling." *Id*. Similarly, in *Gerace*, this Court declined to find that a sign, displayed at the point of sale, disclosing those products containing "imitation cheese" was accompanying the product. *Gerace*, 755 F.2d at 996-997.

The Ninth Circuit has followed this Court's *Jorling* and *Gerace* decisions to reach a similar interpretation of "accompanying" in *Chem. Specialties Mfrs. Ass'n Inc. v Allenby*. 958 F.2d 941 (9th Cir. 1992). In *Allenby*, the Ninth Circuit held that "the term 'labeling' does not apply to . . . point-of-sale signs." *Id*. at 946. The *Allenby* court echoed this Court's precise concern in *Jorling*, that the "definition of labeling cannot encompass every type of written

material accompanying the [product] at any time" because if it did then "price stickers affixed to shelves, sheets indicating that a product is on sale, and even the logo on the exterminator's hat would all constitute impermissible labeling." *Id*.

The Second Circuit's narrow interpretation of "accompanying" is entirely consistent with the evils sought to be remedied by the FMIA labeling provisions. Prior to the addition of the preemption provision regarding labeling, the Clarkson Report highlighted the "evil" of non-uniform state inspection and labeling requirements: adulterated meat that was misleadingly labeled, which deceived consumers. *Meat Inspection: Subcomm. of the Comm. on Agriculture and Forestry*, 90th Cong. 80 (Nov. 9, 10, 14, and 15, 1967) (statement of Rodney Leonard, Deputy Assistant Secretary, Consumer and Marketing Services, U.S. Dept. of Agriculture). The Clarkson Report made it "abundantly clear that the current system of relying upon a patchwork of federal and state" laws had not provided the consumer with an effective system of ensuring that meat products were not adulterated and were properly labeled. *Bills to Clarify and Otherwise Amend the Meat Inspection Act: Hearing before the Subcommittee of the Committee on Agriculture and Forestry*, 90th Cong. 211 (1967)(statement of Mrs. Sylvia Zagoria, National Consumers League).

Congress amended the FMIA in 1967 to respond to this "evil." The 1967 amendments gave the USDA full authority over labeling of meat and meat products in an attempt "to prevent the use of false, deceptive or misleading marks, labels, or containers." *Meat Inspection: Subcomm. of the Comm. on Agriculture and Forestry*, 90th Cong. 45 (Nov. 9, 10, 14, and 15, 1967). Congress was clear that the preemption of state authority over the labeling of meat products was to ensure uniformity, which was necessary to reduce "opportunities for fraud and deceit." *Id*. at 64. (statement of Rodney Leonard).

As a result of this legislative history, the lower court properly found that the "primary intent of the federal labeling requirements is to protect the health and welfare of consumers from fraudulent or deceptive practices by manufacturers and distributors of meat products." Mem. Op. at 3. The District of Michigan in *American Meat Institute v. Ball*, reached precisely the same conclusion that "the primary intent of the federal labeling requirements is to regulate what producers say about their products." 424 F.Supp. 758, 762 (D. Mich. Southern Div. 1976). Indeed, the court in *Ball* aptly stated that "mislabeling and misbranding are synonymous terms." *Id*. at 764. With this statement, the *Ball* court highlighted precisely "the sort of problem Congress was trying to attack through 'labeling' regulations." *Id*. Nothing in the plain language of the FMIA, the legislative history of the labeling provisions, or prior case law indicated even "the slightest intent to prohibit a state from communicating information to its citizen-consumers in order to assist them in making informed purchasing decisions." *Id*. at 766.

Therefore, this Court should maintain a narrow reading of "accompanying" so as to exclude point of sale warnings. Adopting the broad and sweeping reading of "accompanying" that is advocated by the NMPA would result in a "serious intrusion into State sovereignty." *Lohr*, 518 U.S. at 488. In the absence of any evidence from the text of the FMIA, it's implementing regulations, and legislative history that this broad reading was intended by Congress, the Court is bound to "accept the reading that disfavors pre-emption." *Altria Grp.*, 555 U.S. at 543. As such, "accompanying" should not be read to encompass point of sale notifications.

*2. The APCIA's public interest warning is a point of sale notification, not a label.*

The Second Circuit has utilized an "integrated transactions" test to determine if material accompanying a product is a label or a point of sale notification. *U.S. v. 24 Bottles "Sterling Vinegar and Honey*," 338 F.2d 157, 159 (2d Cir. 1964). This Court explained in *Sterling Vinegar*

*and Honey* that "[t]he distinguishing characteristic of a label is that . . . it is presented to the consumer in immediate connection with his view and his purchase of the product . . . in [an] 'integrated transaction[].'" *Id*. Labeling, according to this Court, "is better understood by its relationship, rather than its proximity, to the product." *Jorling*, 874 F.2d at 119.

Based on this 'integrated transaction' analysis, the Second Circuit has held that notifications "designed to warn the public at large" are not preempted 'labeling.'" *Id*. at 120. In *Jorling*, this Court reviewed a New York law that required certain notifications "intended to alert the public to the impending use of poisonous chemicals and to disseminate information to those who may be exposed." *Id*. at 116. This Court concluded that the New York law's notification requirement was not aimed at purchasers of the product, but rather was designed to "ensure minimum warnings to the public at large and a greater degree of disclosure" regarding the public health impacts of pesticides. *Id*. at 119. As a result, the court refused to "transform the admonition into 'labeling.'" *Id*.

The Ninth Circuit relied on *Jorling* to reach a similar conclusion in *Allenby*. 958 F.2d at 946. In *Allenby*, the circuit reviewed California's Proposition 65, which requires the following notification at the point of sale for products known to cause cancer: "Warning: This product contains a chemical known to the State of California to cause cancer." *Id*. at 944 (citing Cal. Code Regs. tit. 22 § 12691 (b)(4)(A) (1991)). The court held that Proposition 65's warning required the "posting of signs" at the point of sale and was not a label. *Id*. at 946.

The distinction between a preempted label and a point of sale notice that is not preempted is perhaps best evidenced in this Circuits decision in *Gerace*. 755 F.2d 993. In *Gerace*, this Court examined a New York statute that had two main components; (1) it required all products intended to substitute for traditional cheese products to include the term "imitation" on the

product label and (2) it required retailers to "display a sign" disclosing those food products that contained imitation cheese. *Id*. at 996-997. The court quickly determined that the first component of the law was preempted because it required additional information on the product label. *Id*. at 1001. However, the court declined to preempt the second component of the law. *Id*. at 1004. Rather, the court found that "the sign, menu and container provisions effectuate[d] a legitimate local public purpose" and was "not inconsistent with federal legislation." *Id*. at 1004-1005.

The public health warning required under the APCIA is precisely the type of point of sale notice at issue in *Jorling*, *Gerace*, and *Allenby*. First, it is not an integrated component of the sale of a product. Rather, as with the notification required in *Jorling* and *Allenby*, the APCIA placard is designed to protect the general public by "providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively affects health." N.Y. AGRIC. & MKTS. LAW § 1000.3. As a result, the APCIA's public interest warning does not target the consumer of an individual product on a grocery store shelf, but rather the general public as a whole.

Second, if this Court was unwilling to preempt the point of sale disclosures in *Gerace* and *Jorling*, it should decline to do so in this case because the APCIA notification is a generalized statement not linked to any individual product. Where the warnings in *Gerace*, *Jorling*, and *Allenby* were specifically connected to individual products, the warning in the APCIA only refers to a particular category of products. In *Jorling*, the required warnings were specific to the particular pesticides being used. 874 F.2d at 116. In *Gerace*, the statute required disclosure of the individual food products that contained imitation cheese. 755 F.2d at 996-997. Even in *Allenby*, the Proposition 65 disclosure required the notification to identify the specific products known to cause cancer. 958 F.2d at 944.

In sharp contrast to these particularized warnings, the APCIA notification does not require identification of individual products. Rather, the retailer must only display a single sign with generic language if they sell animal products intended for human consumption. N.Y. AGRIC. & MKTS. LAW § 1000.4.1. As a result, the APCIA warning is much farther removed from a label then the non-preempted notifications in *Jorling*, *Allenby*, and *Gerace*.

This Court should continue to interpret "accompanying" narrowly so as not to encompass point of sale notifications. The APCIA falls within the category of point of sale warnings that are not preempted by the express provision of the FMIA.

C. The APCIA is not impliedly preempted because it does not conflict with the FMIA

Even if a statute is not expressly preempted, state law can still be impliedly preempted in two ways, (1) field preemption and (2) conflict preemption. *Gade*, 505 U.S. at 98. Field preemption is when the sheer scope of federal regulation in a particular area "indicates that Congress intended federal law to occupy a field exclusively." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Conflict preemption is when either (1) "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or (2) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" the federal statute. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The lower court quickly and correctly determined that there was not field or conflict preemption in this case. Mem. Op. at 15-16. First, field preemption does not apply in the face of the FMIA's express preemption provisions that explicitly reserves room for state action. Second, it is easy to comply with both the FMIA and the APCIA. Third, the APCIA does not hinder, but rather furthers, the FMIA's objective of protecting the consumer.

*1. Field preemption is not applicable in the face of the FMIA's express preemption and savings clause.*

If a federal statute contains an express preemption provision, then the preemptive scope of that statute "is governed entirely by the express language" of the preemption clause. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992). When Congress considers the issue of preemption and includes in the federal statute "a provision explicitly addressing that issue," *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978), then "there is no need to infer congressional intent to pre-empt state laws." *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.). If the plain language of the express preemption clause provides no "reason to infer any broader pre-emption," then implied field preemption should not be found. *Freightliner Corp v. Myrick*, 514 U.S. 280, 288 (1995).

The lower court correctly held that the FMIA "specifically indicates that it did not intend to preempt the field of meat commerce entirely." Mem. Op. at 15. The FMIA has a detailed preemption provision that includes a saving clause. 21 U.S.C. § 678 (2012). This savings clause states that the FMIA "shall not preclude any State . . . from making requirements or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." 21 U.S.C. § 678 (2012) This express provision, which saves room for state regulation, provides no "reason to infer any broader pre-emption" then expressly stated. As a result, field preemption is not applicable to this case.

*2. It is not impossible to comply with both the FMIA and the APCIA.*

A state law may be implicitly pre-empted if it is "impossible for a private party to comply with both state and federal requirements." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). This is a strict standard. *Id*. Courts will not "seek[] out conflicts between state and federal regulation where none clearly exist." *Id*. at 90. If the record fails to demonstrate that it is

"impossible" to comply with both state and federal requirements then preemption will not be found. *Wyeth v. Levine*, 129 S.Ct. 1187, 1199 (2009).

The lower correctly held that it is not physically impossible to comply with the FMIA and the APCIA. Mem. Op. at 16. There is nothing in the record to demonstrate that it is "impossible" to provide the required APCIA point of sale notification as well as the required labeling under the FMIA. Absent this evidence, there is no conflict preemption.

*3. The APCIA is not an obstacle to the accomplishment of the purposes and objectives of the FMIA.*

The second type of conflict preemption occurs when a state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives" of a federal act. *Davidowitz*, 312 U.S. at 67. Implied preemption will not be found just because the "state statute is in tension with the federal objections," but rather "a high threshold must be met if a state law is to be pre-empted for conflicting with the purpose of a federal Act." *Whiting*, 131 S.Ct. at 1985.

The purpose of the FMIA is narrowly focused to prevent "unwholesome, adulterated, mislabeled, or deceptively packaged" meat from entering the Nation's food supply. 21 U.S.C. § 602 (2012). This purpose focuses on protecting the consumer from economic and aesthetic adulteration. On the other hand, the APCIA is focused on reducing "the public's consumption of animal products" in an effort to "reduce the long-term health care and environmental costs to the State." Mem. Op. at 3. The lower court correctly held that the APCIA's notification requirement does not impede the federal objective of preventing "unwholesome, adulterated, mislabeled, or deceptively packaged" meat from entering the food supply. Mem. Op. at 16. In fact, the APCIA ensures that consumers have more information about their food. If anything, this state requirement of additional information furthers the FMIA's objective of protecting the consumer.

The "high threshold" that must be met "if a state law is to be pre-empted for conflicting with the purpose of a federal Act" has not be met in this case.

While the NMPA may dislike the APCIA's required public interest warning, it is not preempted by the FMIA. The APCIA's required warning is not a label. Rather, it is simply a point of sale notification that can coexist with the federal law.

## II. THE APCIA IS A NON-DISCRIMINATORY STATUTE THAT EFFECTUATES A LEGITIMATE STATE INTEREST AND DOES NOT PLACE AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

The Commerce Clause affirmatively grants Congress the power to "regulate Commerce… among the several States." U.S. CONST. art. I, § 8, cl. 3. The "negative" or "dormant" aspect of the Commerce Clause prohibits barriers to the free flow of interstate trade. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 158-59 (2d Cir. 2006). The dormant Commerce Clause is concerned about economic protectionism, in other words "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008). States cannot treat in-state economic interests more favorably than out-of-state, but not all actions designed to give in-state competitors a marketplace advantage are prohibited. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

There are two components to dormant Commerce Clause analysis. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994). First, the Court must determine if the state statute either "regulates evenhandedly with only 'incidental' effects on interstate commerce" or "discriminates against interstate commerce." *Id*. (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). If the statute is discriminatory then it is per se invalid. *Id*. However, if the statute regulates evenhandedly with only incidental effects on interstate commerce, then it is

"valid unless 'the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id*. (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). When proceeding with this analysis, this Court has been reluctant to impede the states' authority to promote the health and safety of its citizens, *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003), and to address environmental concerns. *Maine v. Taylor*, 477 U.S. 131, 151 (1986); *N.Y. State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994).

Chief Justice Burger in 1986 once referred to the "cloudy waters of this Court's 'dormant Commerce Clause.'" *Wardair Canada, Inc. v. Florida Dept. of Rev.*, 477 U.S. 1, 17 (1986) (concurring opinion). The Court later made it clear, however, that "the critical consideration [of dormant Commerce Clause] is the overall effect of the statute on both local and interstate activity." *Or. Waste Sys. Inc.*, 511 U.S. at 99.

A. <u>The APCIA does not facially or in effect discriminate against out-of-state competitors</u>.

If a state law discriminates against interstate commerce it is "per se invalid." *Or. Waste Sys., Inc.*, 511 U.S. at 99. A law is discriminatory if there is differential treatment of in-state and out-of-state economic interests that "benefits the former and burdens the latter." *United Haulers Ass'n*, 550 U.S. at 338. There are two ways that a state law can be found discriminatory; (1) facially, or (2) in its effect. *Id.* The party challenging the state law bears the burden of demonstrating disparate impact on interstate commerce- "[t]he fact that it may otherwise affect commerce is not sufficient." *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998).

*1. On its face, the APCIA treats in-state and out-of-state animal agriculture the same.*

A statute is facially discriminatory if (1) the terms of the statute draw a distinction between in-state and out-of-state competitors, *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 95

(2d Cir. 2009), (2) it expressly impedes the flow of commerce, *Id*., and (3) it operates extraterritorially to control activities occurring outside the state's borders. *Healy v. The Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). For example, in *Baldwin v. G.A.F. Seelig, Inc.*, the Supreme Court invalidated a New York state statute that required a different minimum price requirement for in-state and out-of-state milk. 294 U.S. 511 (1935). Likewise, in *Hughes v. Oklahoma*, the Supreme Court struck down a statute that expressly prohibited the transport of minnows across state lines. 441 U.S. 322, 323 (1979). In *Healy*, the Supreme Court invalidated a Connecticut price-affirmation statute that operated to control conduct beyond the borders of the state. 491 U.S. at 336.

First, the APCIA is not facially discriminatory because the plain language of the statute treats in-state and out-of-state farms equally and does not impede the flow of commerce. This equal treatment is in stark contrast to the facially discriminatory economic protectionist statutes struck down in *Baldwin* and *Hughes*. The APCIA simply requires a placard at the point of sale wherever animal products intended for human consumption are sold. N.Y. AGRIC. & MKTS. LAW § 1000.4.1. By the plain terms of the statute, the required placard applies equally to intrastate and interstate animal products.

Second, because the retailers are responsible for displaying the placards, the APCIA does not fall into the category of an impermissible extraterritorial regulation because it does not regulate commerce that occurs outside the State's borders. Therefore, the APCIA is facially neutral.

*2. The APCIA does not in its effect discriminate against out-of-state farms.*

Even a facially neutral state statute with no discriminatory purpose may impact interstate commerce more heavily than local commerce. *West Lynn Creamery, Inc. v. Healy*, 512 U.S.186,

193-94 (1994).This type of statute is still discriminatory. *Id*. A statute that, in its effect, burdens out-of-state competitors, in turn, burdens interstate commerce. *Id.* The party challenging the state law must demonstrate the statute's disparate impact on interstate commerce. *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998). However, even in the face of evidence of a burden on interstate commerce, the state statute may still not rise to the level of discriminatory. *Exxon v. Maryland*, 437 U.S. 117, 125 (1978).

The NMPA alleges that excluding out-of-state farms from the informational Site disproportionately burdens out-of-state competitors. First of all, the NMPA has not presented any evidence in the record to substantiate this claim of disparate impacts. This is the NMPA's burden, which they have not met.

Secondly, any burden on interstate commerce perceived by the NMPA is de minimus. The APCIA cannot unduly burden interstate commerce because it does not *prohibit* the sale or consumption of any goods in interstate commerce. Rather, the statute merely *informs* consumers of the adverse effects related to consuming animal products. Consumers may then make their own choices regarding whether to (1) purchase animal products and (2) purchase those products from the farms pre-certified by the state or from other sources.

In fact, the APCIA is less prohibitive, and therefore less "burdensome," than many other state laws upheld under the dormant Commerce Clause. For example, in *Minnesota v. Cloverleaf Creamery Co.*, the Supreme Court upheld a law that prohibited the sale of milk in certain plastic containers. 449 U.S. 456 (1981). Therefore, New York's effort to warn its citizens is not impermissibly discriminatory under the dormant Commerce Clause as a result of undue burdens.

Even if a statute disparately impacts interstate competitors, this fact alone does not "establish a claim of discrimination against interstate commerce." *Exxon v. Maryland*, 437 U.S.

at 125. In *Exxon*, the Court upheld a facially-neutral law that prohibited petroleum producers from operating retail gas stations. *Id*. There were no petroleum producers located in Maryland and thus the law only affected out-of-state producers. *Id*. The court declined to find the Maryland statute discriminatory for three reasons: the statute did not (1) prohibit the flow of interstate goods; (2) increase the costs of the goods; or (3) distinguish between in-state and out-of-state companies. *Id*. at 125-126.

If the Court finds that the APCIA imposes a disparate impact on out-of-state competitors, it should apply *Exxon's* and find the statute non-discriminatory. First, the APCIA does not prohibit the flow of interstate goods into New York. Here, as in *Exxon*, the out-of-state competitors may continue to compete directly with New York competitors because there is no ban on the sale of their products in New York retail establishments. As a result, there is no impediment to market participation and competition. Second, the APCIA has no effect on the price of interstate products, as none of the producers involved have any additional responsibilities in implementing the law. Third, the informational Site does not distinguish between competitors solely based on their in-state or out-of-state status. Rather, it simply identifies those farms that have been pre-certified as environmentally sustainable and humane to animals.

The APCIA is a not a discriminatory statute. It is a facially neutral statute that regulates evenhandedly. Therefore, it is a presumptively valid regulation that should not be set aside lightly. *See L & L Started Pullets, Inc. v. Gourdine, 762 F.2d 1 (2d Cir. 1985).*

B. <u>The legitimate local interests of the APCIA could not be served as well by other means.</u>

When the challenged state law regulates even-handedly, then the court balances the local interests in maintaining the regulation against the incidental burden on the free flow of interstate

commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142-42 (1970). This balancing analysis is very deferential. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 95 (2d. 2009). The *Pike* balancing test requires that the court first identify the state's interest. *Pike*, 397 U.S. at 145. The court must then weight the state's interest against the burden on interstate commerce. *Id*. at 142. The state statute "will be upheld" unless either (1) the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits" or (2) the local interest involved could "be promoted . . . with a lesser impact on interstate activities." *Id.*

*1. The APCIA serves a legitimate local interest of advancing human and environmental well-being.*

When defining the legitimate local interest served by the state statute, a court must defer to the judgment of the state legislature because courts are "not inclined to second-guess empirical judgments of lawmakers concerning the utility of legislation." *Brown v. Williamson Tobacco Corp.*, 320 F.3d at 209. The state bears the burden of proving that the statute is likely to achieve its "wholly laudable" goals. *Id*. at 208.

The APCIA was designed to advance human health and environmental concerns. The lower court correctly found that the APCIA serves the legitimate local interest of "protect[ing] 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." *Id.* (quoting N.Y. AGRIC. & MKTS. LAW § 1000.3 (emphasis added). The lower court accurately held that interests were legitimate. Mem. Op. at 19.

Furthermore, the evidence in the record demonstrates that better-educated consumers are more likely to make healthier, environmentally friendly, and more humane food choices. Mem.

Op. at 3. As a result, the record establishes that the informational component of the APCIA, including extensive informational Site, will effectuate New York's legitimate local interest.

*2. The APCIA does not pose a clearly excessive burden on interstate commerce in relationship to the state's legitimate interest.*

The next step is to balance the state's interest against any "incidental burdens" on interstate commerce. *Pike,* 387 U.S. at 142. This Court's holding and reasoning in *Brown & Williamson Tobacco Corp.* should be controlling in this case because of the analogous nature of New York's public interest in relation to the incidental burdens in that case.

In *Brown v. Williamson & Tobacco,* this Court stated that New York had a legitimate local interest in seeking to reduce the sale of cigarettes to minors, and that the goal was valid under its police power. *Brown,* 320 F.3d at 216-17. This legitimate authority to regulate the sale of cigarettes had only mere incidental effects on interstate commerce because the statute prohibited only one method of cigarette sales to New York consumers. *Id*. at 217. Accordingly, this Court held that the statute's "burdens on interstate commerce [were] not excessive relative to its local benefits."

Unlike the statute in *Brown*, the APCIA does not go so far as to *prohibit* the sale of goods in interstate commerce. *See supra* at 24, Part II.A.iii *(*discussing the APCIA's de minimus burden on interstate commerce). If this court did not find the interstate burden excessive relative to the state's interest in *Brown*, it should likewise hold do so here. In light of *Brown*, any burden on interstate commerce as a result of merely providing consumers with information cannot be considered excessive relative to the local benefit of promoting human health and environmental sustainability.

Furthermore, this Court acknowledged in *Brown* that the local benefit gained from a lower consumption of cigarettes yielded "concomitant benefits to health" and therefore, the local

benefits derived from the statute were not "clearly outweighed by the Statute's de minimis effect on interstate commerce." 320 F.3d at 217. According to the record, the reduction of the consumption of animal products is likely to yield concomitant benefits to human health, the environment, and animal welfare.

*3. The state's legitimate purpose of the APCIA cannot be promoted with a lesser impact on interstate activities.*

The last step in *Pike* balancing is to determine whether New York's legitimate interests could be "promoted as well with a lesser impact on interstate activities." *Pike*, 387 U.S. at 142. The APCIA withstands this portion of the *Pike* test for two reasons.

First, there is no other means of effectuating New York's public interests with a lesser impact on interstate activities because the incidental burden already de mimimus. There is a long history of case law finding adequate means to promote the health, safety, and consumer protection of New York citizens without violating the dormant Commerce Clause. *Cf, Brown & Williamson Tobacco Corp.*, 320 F.3d 200; *See also, Maine v. Taylor*, 477 U.S. 131 *(*sustaining environmental Maine law that blocked all inward shipments of live baitfish).

Second, the inclusion of humane and environmentally sustainable farms on the informational Site is necessary. The New York Agency of Agriculture is in the best position to certify the existence of environmentally sustainable and humane farms. This is as a result of their expertise and resources. In its recommendations to the legislature, the Committee cited evidence that "better educated consumers" make purchases that result in a reduction of the long-term health care and environmental costs. Mem. Op. at 3. As a result, there is not a more adequate and cost-effective method to "better educate" consumers than by listing fully-vetted farms currently meeting the environmental and animal welfare standards established by the New York

administrative agencies. The exclusion of pre-certified farms would negate New York's wholly laudable efforts to provide complete and accurate information to its consumers.

Lastly, the District Court found that New York could include the names of non-New York farms to the list of suggested producers on the web site. The Supreme Court recognized that although it is incumbent upon states to make "reasonable efforts to avoid restraining the free flow of [interstate commerce]," it is not required to "develop new and unproven means of protection [of its own interests] at an uncertain cost." *Maine v. Taylor*, 477 U.S. at 138. Developing a certification scheme adequate to certify interstate farms, which are subject to their own states' regulations oftentimes inconsistent with those of New York, would undoubtedly involve a number of "uncertain costs." Any alternative means of granting certification would certainly result in "unproven methods" of guaranteeing the farms abide by humane and environmental standards.

## III. THE COURT SHOULD REJECT THE INDUSTRY'S VEILED ATTEMPT TO LIMIT CONSUMER ACCESS TO INFORMATION ABOUT THE HEALTH, ENVIRONMENTAL, AND ANIMAL WELFARE IMPACTS OF ITS PRODUCTS.

This case is yet another attempt by the meat industry to silence the message that (1) the consumption of animal-based products have been linked to heart disease, cancer, type 2 diabetes, autoimmune diseases, stroke, hypertension, decreased bone and kidney health, brain disorders like Alzheimer's, and infectious diseases, Mem. Op. at 4-5, (2) industrial agriculture negatively effects the environment, *Id*. at 8-10, and (3) the "animal handling and confinement" practices of industrial agriculture leads to animal suffering. *Id*. at 2. As history has shown, the meat industry has been successful in preventing this important information from reaching the average consumer. *See e.g. Id*. at 17; *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (state statute that required disclosure if milk came from dairy cows treated with rBST was

unconstitutional on First Amendment grounds). If the Court rules for the NMPA in this case, then the average consumer may never be faced with the cold hard facts about the negative impacts of animal agriculture. The "informed consumer" may soon be just a myth.

The APCIA's passage is unprecedented for several reasons. First, New York is the first state to actively warn consumers at the point of sale of the adverse effects of animal agriculture. As a result, the impact of this litigation will affect how other are states are able to educate and inform their citizens.

Second, the APCIA's passage was particularly significant considering that efforts to encourage and promote plant-based diets have been met with opposition by powerful agribusiness lobbies at the federal level. Mem. Op. at 17. For example, the United States Department of Agriculture ("USDA"), the federal agency responsible for developing food and nutrition dietary guidelines, recently succumbed to pressure from the meat industry after making an attempt to promote the adverse environmental impacts of eating meat. *Id*. at 17-18(citing Sydney Lupkin, *Meat Industry Has Beef with Meatless*" *Monday, Forces USDA to Retract Newsletter*,, ABC News (July 26, 2012)). The lower court highlighted the industry's recent efforts to suppress consumer access to information with state "ag-gag" laws. Mem. Op. at 17-18. These laws prevent the documentation of animal industry practices with video and photograph.

Finally, in the absence of leadership from the federal government, New York took the trailblazing step of not only actively warning consumers of the adverse impacts of animal food products, but also providing its consumers with meaningful information on precisely where to source food from more humane and sustainable producers. This is precisely the sort of innovations that are dual system of government encourages. It is for this reason that the Supreme Court has observed that even if the merits of a particular state requirement are "out of line with

the requirements of the other states [they] may be so compelling that the innovating State need not be the one to give way." *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 531 (1959).

The federal government and many state governments are submissive to the demands of the industry and have silenced the message about the negative impacts of animal agriculture and its products. This Court, however, should reject the NMPA's use of the Supremacy Clause and the Commerce Clause as a vehicle to hamper consumer access to information.

## CONCLUSION

For all the aforementioned reasons, this Court should reverse the District Court's grant of summary judgment for the Respondent and enter judgment in favor of the State of New York. This Court should find that the APCIA is a valid exercise of New York's police power that is (1) not preempted by the FMIA and (2) does not burden interstate commerce.

Respectfully submitted,

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Competition Team Number 8