Case No. CV 11-55440 NCA (ABCx)

United States Court of Appeals, Second Circuit

NATIONAL MEAT PRODUCERS ASSOCIATION,

Plaintiff/Appellee

v.

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

Defendants/Appellants

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

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BRIEF FOR APPELLEE

NATIONAL MEAT PRODUCERS ASSOCIATION

Team 9
Counsel for Plaintiff/Appellee

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I. Does the Animal Products Consumer Information Act violate the Supremacy Clause of the Constitution because it imposes labeling requirements that the Federal Meat Inspection Act, 21 U.S.C. § 678, expressly forbids states from imposing?

II. Does the Animal Products Consumer Information Act violate the Commerce Clause of the Constitution, because it discriminates against out-of-state farms and impermissibly burdens interstate commerce?

STATEMENT OF THE CASE

The Commissioner of the New York State Department of Agriculture and Markets and the New York State Department of Agriculture and Markets (Appellants) brought this appeal from the United States District Court for the Southern District of New York's grant of the National Meat Producers Association's motion for summary judgment. The judgment entered in the district court held the Animal Products Consumer Information Act (APCIA), N.Y. Agric. & Mkts. Law & 1000, invalid because it violates the Constitution of the United States. Appelants contend that the APCIA does not violate the Constitution. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE FACTS

This case is about the far-reaching implications of the well-intentioned but constitutionally problematic Animal Products Consumer Information Act ("APCIA"), N.Y. Agric. & Mkts. Law § 1000, passed by the New York legislature in 2010. (R. 1).

Faced with significant fiscal constraints, the New York legislature was understandably eager to explore any idea that purported to reduce long-term government costs without a significant reduction in state benefits. (R. 3). The notion that reducing "the public's consumption of animal products would in turn reduce the long-term health care and environmental costs to the state" was compelling. (R. 3). However, because implementing real substantive change in the farm industry would take time, the legislature chose instead to pass the APCIA as a precursor to broader reform. (R. 3). The act requires all New York retailers who sell animal products intended for human consumption, to post warning placards that address the potential health consequences of eating meat, as well as the potential impact of some industrial animal agriculture techniques on the environment and the treatment of animals. (R. 2) The self-described "LABELING REQUIREMENT" must also direct consumers to a state-sponsored website, www.informedchoice.ny.gov, which provides further detailed information about animal agriculture and lists farms that the state determined were environmentally sustainable and employed humane welfare standards. (R. 4). Notably, the website fails to provide any listings of environmentally sustainable and humane farms outside of New York. (R. 4). The New York legislature passed the APCIA, despite the prior existence of the Federal Meat Inspection Act, (R. 2), which prohibits states from imposing "Marking,

labeling, packaging, or ingredient requirements *in addition to* [those required by the Act]" 21 U.S.C. § 678 (emphasis added).

SUMMARY OF THE ARGUMENT

A. The Animal Products Consumer Information Act (APCIA) violates the Supremacy Clause of the Constitution as applied in this case.

The plain meaning of the text of the Federal Meat Inspection Act (FMIA) expressly forbids states from imposing labeling requirements on meat products in addition to those imposed by the FMIA. The Supreme Court unanimously upheld this interpretation of the FMIA in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). The district court correctly determined that the APCIA imposed additional labeling requirements on meat products. However, the district court ignored the express, preemptive language in the FMIA and held instead that preemptive intent could not be implied. The APCIA imposes labeling requirements on meat products in addition to those required by the FMIA, as expressly prohibited by that Act. The APCIA is therefore in direct conflict with the FMIA, and must yield to the Federal Law. U.S. Const. art. VI, cl. 2. Because the district court held to the contrary, its decision on this issue must be reversed.

B. The APCIA violates the Commerce Clause of the Constitution.

The Animal Products Consumer Information Act ("APCIA") exceeds congressional authority under the Commerce Clause of the Constitution both because it discriminates against farms outside of New York State and because the burden it imposes on interstate commerce outweighs any local putative benefits. By imposing a requirement on New York retailers to display a placard that directs consumers to a website that

explicitly promotes only New York farms, the APCIA discriminates against out-of-state farms. The APCIA provides no mechanism by which out-of-state farms could ever be included on the list and therefore leaves consumers with the impression that New York farms are the only option for buying environmentally sustainable and responsible animal products. Furthermore, the State fails to show how this aspect of the labeling requirement advances the purported public benefits of the APCIA. Interstate commerce is significantly burdened and other states will be driven to similarly promote their own businesses to the detriment of a unified, national economy. Finally, the State could pursue several other non-discriminatory, reasonable alternatives that would have less of an impact on interstate commerce.

ARGUMENT

I. THE FEDERAL MEAT INSPECTION ACT, 21 U.S.C.A. § 678 (West), EXPRESSLY PREEMPTS THE LABELING REQUIREMENTS OF THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT, N.Y. Agric. & Mkts. Law § 1000 § 4, AS APPLIED IN THIS CASE.

"[T]he Laws of the United States which shall be made in Pursuance [of the Constitution] … shall be the supreme Law of the Land[.]" U.S. Const. art. VI, cl. 2. [U]nder the Supremacy Clause, from which [the] pre-emption doctrine is derived, "'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (quoting *Felder v. Casey,* 108 S.Ct. 2302 (1988)).

The constitutionality of the FMIA is not disputed in this case. The sole question before the Court with respect to this issue is whether the FMIA preempts the APCIA as applied to the sale of beef and pork products. Briefing Order, Nat. Meat Producers Assn.

v. New York, No. CV 11-55440 NCA (ABCx) (2nd Cir. Sept. 15, 2012). This Court's inquiry into whether a federal statute preempts state law must be limited to a determination of Congress' intent when it enacted the statute. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008). Furthermore, "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in [its] language …, and if that is plain …, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917).

The plain language of the FMIA expressly forbids states from imposing "[m]arking, *labeling*, packaging, or ingredient requirements *in addition to*, or different than, those made under [the FMIA.]" 21 U.S.C. § 678 (emphasis added). Furthermore, the Supreme Court's decision in *Jones v. Rath Packing Co.* affirmed that it was Congress' express intention to preempt state statutes that impose such labeling requirements. 430 U.S. 519 (1977) (holding that the FMIA preempted a California statute that imposed "labeling requirements" on packaged bacon). Because the APCIA imposes labeling requirements on meat products in addition to those required by the FMIA, *Rath Packing Co.* controls this case and compels reversal of the district court.

A. The standard of review is *de novo*.

The issue before the Court is review of the district court's application of preemption principles. This Court reviews a district court's application of preemption principles *de novo*. *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103 (2d Cir. 2010).

B. The district court failed to appropriately conclude its preemption inquiry once it determined that the APCIA imposed labeling requirements.

Congressional intent to preempt state law may be either express or implied. *Rath Packing Co.*, 430 U.S. at 525. The FMIA expressly preempts state imposed labeling requirements that are "in addition to, or different than" those made under the Act. 21 U.S.C. § 678; *Rath Packing Co.*, 430 U.S. at 530. The district court correctly determined that the placard mandated by the APCIA is a labeling requirement under the FMIA. That should have been the end of the district court's inquiry. *See Rath Packing Co.*, 430 U.S. at 530–31 (the explicit preemption provision in section 678 of the FMIA dictates the outcome where the state has imposed labeling requirements in addition to or different than those imposed by the Act). However, instead of properly performing its "sole function" of enforcing the FMIA "according to its terms," *Caminetti v. United States*, 242 U.S. at 485-86, the district court engaged in an inappropriate, policy-based justification for why preemption should not be implied. *See* Nat. Meat Producers Assn. v. New York, No. CV 11-55440 NCA (ABCx), at 12–18 (S.D.N.Y. Sept. 15, 2012) ("If the placard requirement constitutes labeling, then the Court must determine if the APCIA is preempted by the FMIA."). The district court's extracurricular inquiry, in place of a straightforward application of Congress' express preemptive intent, led to the court's errant decision.

C. <u>The FMIA expressly preempts state laws that impose labeling requirements for meat products that are in addition to those imposed by the Act.</u>

"Marking, *labeling*, packaging, or ingredient requirements *in addition to*, or different than, those made under this chapter *may not be imposed by any State* … with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter…" 21 U.S.C. § 678 (emphasis added).

Both pork and beef are meat products that are subject to the requirements of subchapter I of the FMIA. 21 U.S.C. § 601(j). By the time they are offered for sale and are required by the State to comply with the APCIA, the meat products must have already complied with the inspection and labeling requirements of the FMIA. 21 U.S.C. §§ 603, 607. Therefore, the plain language of the FMIA disallows states from imposing any additional labeling requirements on them.

Congress' express intent to preclude states from exercising jurisdiction over labeling of FMIA regulated meat products is further demonstrated by the Act's specification of circumstances in which concurrent jurisdiction over those products *is* appropriate. Immediately following the prohibition against state-imposed labeling requirements, the Act states that "any State … may … exercise concurrent jurisdiction … over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded *and* are outside of [] an establishment [under inspection in accordance with the Act.]"[1]. 21 U.S.C. § 678 (emphasis added). Furthermore, the Act does not "preclude any State … from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." *Id.*. Thus, after expressing its intent to preempt state jurisdiction over labeling, Congress specified those circumstances in which it did not intend preemption. *Id.*.

In *Rath Packing Co.*, the Supreme Court evaluated the constitutionality of a

[1] The labeling requirements of the APCIA are imposed at locations where meat products are sold for human consumption. N.Y. Agric & Mkts. Law & 1000. Such locations may not be establishments under inspection in accordance with the FMIA. *See* 21 U.S.C. § 603. However, nothing in the APCIA indicates that it applies only to meat products alleged to be adulterated or misbranded as defined in the FMIA. 21 U.S.C. § 601 (m)–(n). *See* N.Y. Agric & Mkts. Law & 1000. Therefore, the APCIA does qualify for the concurrent jurisdiction exception.

California statute that imposed labeling requirements for meat products that were more stringent than those imposed by the FMIA. 430 U.S. at 526–31. In that case, the Court assumed that the state statute was within the California's traditional police powers and would be valid in the absence of preemptive federal law. *Id.* at 525–26. The question was whether the FMIA preempted application of the state law. The Court began 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.'" *Id.* at 525 (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)). The Court unanimously agreed that the plain meaning of the FMIA, 21 U.S.C.§ 678, overcame the assumption against preemption, holding that the "explicit pre-emption provision" prohibiting labeling "different than, or in addition to" the requirements of the FMIA "dictate[d] the result in the controversy[.]" *Id.*, at 530–31.[2]

The district court misread *Rath Packing Co.* as being limited "to the facts" and *not* "hold[ing] that the FMIA preempts all state law labels on meat products" of that case. Nat. Meat Producers Assn., No. CV 11-55440 NCA (ABCx), at 16. In support of its errant view, the district court cited only the Supreme Court's statement that "[w]e therefore conclude that with respect to [the defendant's] packaged bacon, [the state statutes] are pre-empted by [the FMIA]." *Id.* (quoting *Rath Packing Co.*, 430 U.S. at 531). The district court's error was reading the quoted language as an isolated statement rather than in the context of the case. *Rath Packing Co.* involved application of the

[2] The labeling requirements invalidated in *Rath Packing Co.* were "different than" those imposed by the FMIA. The "explicit pre-emption provision" of the FMIA that the Court relied on prohibits labeling requirements "different than, *or* in addition to" the FMIA. 21 U.S.C. § 678 (emphasis added). Nothing in the Act, or the Court's opinion, suggest that labeling requirements that are "different than" and those that are "in addition to" should be treated inconsistently. *See, Id.*; *Jones v. Rath Packing Co.*, at 530–32.

California statute to both meat products and miller's flower, which is not regulated by the FMIA. *See* 21 U.S.C. § 602. The Court's specification that the FMIA preempted application of the state statute to the defendant's bacon was intended to stand in contrast to its application to the defendant's miller flour. The Court went on to find application of California's statute to the miller flour to be preempted by the Fair Packaging and Labeling Act. *Rath Packing Co.*, 430 U.S. at 543 ("We therefore conclude that with respect to the millers' flour, enforcement of [the state statute is preempted by] the FPLA…. and the state law must yield to the federal."). Nothing in the Court's opinion suggests that it's unanimous holding[3] should be read narrowly or was limited to the facts of the case. *See, Id.*

D. <u>The requirements of the APCIA are preempted by the FMIA.</u>

The APCIA requires meat vendors to post warnings related to alleged harms that the FMIA does not address. *Compare* 21 U.S.C. § 607, *with* N.Y. Agric. & Mkts. Law § 1000.[4] Thus, the requirements of the APCIA are "in addition to" those imposed by the FMIA, and are expressly preempted if they constitute labeling requirements as defined in the Act. *See Jones v. Rath Packing Co.*, 430 U.S. at 530. Section 4 of the APCIA is titled "LABELING REQUIREMENT". That section requires that a warning placard must be

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[3] The Court unanimously agreed that the FMIA expressly preempted the state statute with respect to defendant's packaged bacon. Justice Rehnquist, joined by Justice Stewart, wrote separately to dissent from the portion of the opinion holding that preemption with respect to the miller's flour was implied in the FPLA. *Jones v. Rath Packing Co.*, at 543–44 (Rehnquist, J., concurring in part and dissenting in part)

[4] The required placards 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. Some animal handling and confinement techniques also lead to animal suffering. The State encourages its citizens to conduct research and make informed choices when purchasing and consuming animal products. For more information, visit www.informedchoice.ny.gov." N.Y. Agric & Mkts. Law & 1000 § 4.

"prominently displayed" and "clearly visible to [the] customer" wherever meat products are "offered for sale[.]" N.Y. Agric. & Mkts. Law § 1000 § 4.

"Labeling" is defined in the FMIA as "all labels and other written, printed, or graphic matter (1) *upon* any article or any of its containers or wrappers, or (2) *accompanying* such article." 21 U.S.C. § 601(p) (emphasis added). "Accompanying" must mean something more than direct placement "upon" in order to avoid the preceding provision rendering the later redundant in the statute. *Freytag v. C.I.R.*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."). In this context, the stringent visibility requirements of the APCIA certainly could not be met unless the warning placard accompanies the meat product. The warning placard is therefore a labeling requirement, and as such, is preempted by the FMIA.

1. The APCIA imposes requirements that are in addition to those imposed by the Act.

The warning placard required by the APCIA does not attempt to abrogate or modify any of the labeling information required by the FMIA. *See* N.Y. Agric. & Mkts. Law § 1000 § 4. Instead, the placard addresses the alleged environmental, health, and animal mistreatment risks associated with meat products, concerns that the FMIA labeling requirements do not address. *See* 21 U.S.C. § 607. Accordingly, a meat product in full compliance with the requirements of the FMIA could nonetheless fall short of compliance with APCIA if the required warning placard is not properly displayed. Thus, the requirements of the MCIA are *in addition to* those imposed by the FMIA.

2. The additional requirements imposed by the APCIA are labeling requirements.

In reaching its decision in *Rath Packing Co.*, the Supreme Court specifically rejected a narrow construction of "labeling requirements" as comprehended by the FMIA. *Rath Packing Co.*, 430 U.S. at 531. In response to the petitioner's claim that "provisions governing the accuracy of [certain product information]" were not labeling requirements, the Court held that "[n]othing in the Act suggests the restrictive meaning petitioner ascribes to the phrase 'labeling requirements.' To the contrary, … [i]t twists the language beyond the breaking point to say that a law mandating that labeling contain certain information is not a 'labeling requirement.' We therefore conclude that [as applied to the meat products in question, the state statute is] pre-empted by federal law." *Rath Packing Co.*, 430 U.S. at 532.

Both "label" and "labeling" are defined terms in the FMIA. Labeling means "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) (emphasis added). That definition is broader than "label" which the statute defines as "a display of written, printed, or graphic matter upon the *immediate container* (not including package liners) of any article." *Id.* at § 601(o) (emphasis added). Thus, although a label must be upon the product's immediate container, *Id.*, a labeling requirement is imposed where "other written, printer, or graphic matter" is upon any container, *or* is required to accompany the meat product. *Id.*, at § 601(p). Wherever possible, this Court must interpret the FMIA to give operate effect to every word of the Act. *See United States v. Nordic Vill. Inc.*, 503 U.S. 30, 35 (1992). For "accompanying" to retain independent

operate effect, it must refer to written printed or graphic matter that is not physically "upon any of [the meat product's] containers or wrappers." 21 U.S.C. § 601(p).

"Accompanying" is not defined in the FMIA. When words of common usage are not defined in the statute being construed, courts presume that Congress intended to give them their plain meaning. *See Caminetti*, 242 U.S. 470. Webster's New English Dictionary defines accompany as "to occur with; [to] attend." Webster's New English Dictionary 16 (2d ed. 1959). Section 4 of the APCIA, entitled "LABELING REQUIREMENT," mandates that a warning placard must be "prominently displayed" and "clearly visible to a customer viewing the animal products" wherever those products are "offered for sale[.]" N.Y. Agric. & Mkts. Law § 1000 § 4. It is strenuous to imagine how compliance with this standard could be achieved without the placard occurring in association with, or attending the meat products.

Indeed, the majority of courts that have addressed the issue have found that product information disseminated in a manner similar to that required by the APCIA, accompanies the product and therefore constitutes "labeling." *Meaunrit v. ConAgra Foods Inc.*, 2010 WL 2867393 (N.D. Cal. July 20, 2010) (posting of an in-store sign accompanied meat product for sale and was therefore labeling under the FMIA); *United States v. Diapulse Mfg. Corp. of Am.*, 269 F. Supp. 162, 165 (D. Conn. 1967) ("The word 'accompanying' has been given a broad interpretation and comprises any materials which are intended to make claims or refer to a product")[5]. Courts have consistently held that "accompanying" must be given a broad interpretation. *Id.*

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[5] The court in *Diapulse Mfg. Corp. of Am.* was interpreting the Federal Food, Drug, and Cosmetic Act, which defines labeling in language that is identical to the FMIA: "The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers

The fact that the warning placard required by the APCIA does not need to be physically upon the meat products container does not prevent it from being a labeling requirement. *Compare* 21 U.S.C. § 601(o) *with Id.*, at § 601(p). Rather, the APCIA's stringent visibility requirements lead to the inescapable conclusion that compliance with the APCIA is impossible unless the required warning placard accompanies the meat product where it is offered for sale. Thus, while the APCIA may not require a label, it is nonetheless a labeling requirement as defined by the FMIA.

3. The lone district court case finding that a state statute similar to the APCIA did not impose labeling requirements was poorly reasoned and wrongly decided.

The lone case to interpret the FMIA as not preempting a state law requiring a warning placard similar to the one required by the APCIA is *Am. Meat Inst. v. Ball*, 424 F. Supp. 758, (W.D. Mich. 1976) (Michigan statute requiring sellers of meat products that did not meet State ingredient requirements to notify customers via a red and yellow notice placard did not impose labeling requirements as defined in the FMIA)[6]. It is noteworthy that the district court in *Ball* addressed and did not dispute the fact that the FMIA preempts state statutes that impose labeling requirements. *Id.* at 762 ("I find that the notices here are not 'labeling,' and thus not preempted[.]"). Instead, the court acknowledged that "interpretation of the term 'accompanying,' … [was] the central issue

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or wrappers, or (2) accompanying such article." 21 U.S.C. § 321. The FMIA and the FDCA are commonly interpreted as *in pari materia*. *See Rath Packing Co.*, 430 U.S. at 533.

[6] One other district court has found, in a separate context, that information posted near a meat product was not labeling under the FMIA. In *Gershengorin v. Vienna Beef, Ltd.*, 2007 WL 2840476 (N.D. Ill. Sept. 28, 2007), the plaintiff brought consumer fraud claims against a vendor that had posted signage at hot dog stands representing hot dogs encased in pork as being 100% beef. The defendant argued that the FMIA preempted the state law claims. The court summarily stated that "[t]he FMIA does not preempt regulation of signage separate from the marking or labeling on meat packaging itself[,]" *Id.*, without any mention whatsoever of the "accompanying" provision; effectively reading it out of the statute.

in [the] case." *Id.* at 763–64.

Despite stating that the case hinged on an interpretation of "accompanying," the district court in *Ball* failed to interpret the crucial term in a manner that left it with any independent operative effect. *See Nordic Vill. Inc.*, 503 U.S. at 35. Instead, the court's treatment of "accompanying" consisted of a cursory refusal to interpret the term in accordance with multiple cases broadly construing identical language in the Food, Drug, and Cosmetic Act (FDCA)[7]. *Ball*, 424 F. Supp. at 764–66. *See, e.g.,* Kordel v. United States, 335 U.S. 345, 349 (1948) ("One article or thing is accompanied by another when it supplements or explains it[.]"); United States v. Urbeteit, 335 U.S. 355, 69 (1948) (descriptive leaflets that did not physically accompany cosmetic devices during shipment were nonetheless "accompanying" under the FDCA). The district court's refusal to interpret "accompanying" in the FMIA *in pari materia* with cases construing the identical FDCA provision is particularly troubling given that the district court found "the history behind adoption of the Food, Drug and Cosmetic Act's definition of labeling … [to be] appropriate precedent[] upon which to base a decision in [the] case." *Ball*, 424 F. Supp. at 766.

The *Ball* court found that FDCA cases construing "accompanying" broadly, did so because a broad construction in those cases furthered the Act's policy goal of consumer protection. *Id*. Because the *Ball* court believed that preemption of the state statute would not further what it perceived to be the similar policy aims of the FMIA, it concluded that a narrower construction of the term was required. The *Ball* court relied

[7] *Ball* was decided in 1976, thirty-four years before *Meaunrit v. ConAgra Foods Inc.*, 2010 WL 2867393 (N.D. Cal. July 20, 2010) construed "accompanying" broadly in the context of the FMIA. When *Ball* was decided, cases construing the term in the context of the FDCA were the most instructive precedent available.

exclusively on its interpretation of the legislative history of the FDCA to conclude that Congress did not intend the labeling prohibition in the FMIA to preempt the state statute at issue. A faithful reading of the text of the FMIA and cases construing the plain meaning of identical language in the FDCA required precisely the opposite decision.

E. **This case provides no occasion to abandon the fundamental principle that a statute's plain language is determinative evidence of congressional intent.**

"It is elementary that the meaning of a statute must, in the first instance, be sought in [its] language …, and if that is plain …, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917). The Supreme Court has "repeatedly held, the authoritative statement [of congressional intent] is the statutory text." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005). The "strong presumption" that the plain meaning of a statutory provision is determinative of Congress' intent can only be rebutted in "rare and exceptional circumstances." *Ardestani v. I.N.S.*, 502 U.S. 129, 134 (1991).

Despite finding that the APCIA imposed labeling requirements on meat products in addition to the FMIA, as explicitly prohibited by the plain meaning of 21 U.S.C. § 678, *See Jones v. Rath Packing Co. at* 530, the district court reached the unprecedented conclusion that the state statute was nonetheless not preempted[8]. The district court based its departure from the textual requirements of 21 U.S.C. § 678 on its belief that reading that section to preempt the APCIA would be inconsistent with the purpose of the Act as expressed in 21 U.S.C. § 602. (R. 14); *See* 21 U.S.C.A. § 602 (West). In the district court's opinion, "Congress did not intend to control information about the effects of

[8] While the court in *Ball* found a similar statute to the APCIA not preempted, it did so on the grounds that the state statute did not impose labeling requirements. *Ball*, 424 F. Supp. at 762–64.

eating animal products on consumers' health…", and therefore did not intend the Act to preempt a state labeling requirement pertaining to that subject matter. *Id.*.

`Contrary to the district court's opinion, preemption of the APCIA is consistent with the purpose of the Act as defined in 21 U.S.C. § 602. That section expresses Congress' desire to prevent the "destr[uction] [of] markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products …" 21 U.S.C. § 602. The APCIA labeling requirement warns consumers of alleged harmful consequences from the consumption of meat products including those in full compliance with the FMIA. *See* N.Y. Agric. & Mkts. Law § 1000 § 4. By dissuading consumers from purchasing FMIA compliant meat products, the APCIA would have a destructive effect on the markets that Congress sought to protect. Thus, applying the express preemption provision, 21 U.S.C. § 678, to the APIAC, is entirely consistent with the purpose of the Act as described in 21 U.S.C. § 602.

Even if it is assumed *in arguendo* that preemption of the APCIA is not consistent with 21 U.S.C. § 602, it not a sufficient reason to depart from the plain meaning of 21 U.S.C. § 678. The Supreme Court has declined to find the exceptional circumstances necessary to override the plain meaning of a statutory provision even in cases where it leads to an outcome inconsistent with other provisions of the statute. *Crooks v. Harrelson*, 282 U.S. 55, 61 (1930) (plain meaning of a provision of the Revenue Act was upheld despite potentially absurd incongruity with other provisions of the Act, because the incongruity did not lead to a constitutionally impermissible outcome). Had Congress intended to limit the preemptive effect of 21 U.S.C. § 678 in the manner suggested by the district court, it knew how to do so in the text of that section. *See* 21 U.S.C.A. § 678

("This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any… matters regulated under this chapter [other than marking, labeling, packaging, or ingredient requirements.]"). Any arguable incongruity with caused by a plain-meaning construction of 21 U.S.C. § 678 is a far cry from the "absurdity [that is] so gross as to shock the general moral or common sense…" that is required to "justify a departure from the letter of the law[.]" *Harrelson*, 282 U.S. at 60.

II. THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION BECAUSE IT IS DISCRIMINATORY AND EXCESSIVELY BURDENS INTERSTATE COMMERCE.

The APCIA is unconstitutional because it discriminates against animal agriculture businesses located outside of New York and burdens interstate commerce in excess of any local benefit. The Commerce Clause grants Congress the power to regulate commerce "among the several states," U.S. Const. art. 1, § 8, cl. 3, and has long been understood to have a "negative" or "dormant" aspect that requires states to refrain from placing economic barriers between themselves and other states that would disrupt the unified national economy. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532-33 (1949). Consistent with this principle, the Supreme Court has developed a two-part test to analyze state laws under the dormant Commerce Clause. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). A law that "discriminates against interstate commerce" will likely be *per se* invalid. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Alternatively, if the law's "effects on interstate commerce are only incidental," it will be subject to a balancing test that weighs the

burden imposed on interstate commerce in relation to any putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The framers of the Constitution sought to avoid the patchwork system of conflicting state regulations driven by economic protectionism that plagued relations among the colonies and later among the states under the Articles of Confederation. *Granholm v. Heald,* 544 U.S. 460, 472-73 (2005). By explicitly promoting in-state businesses and diminishing the ability of out-of-state businesses to enter the market, the APCIA threatens to do exactly what the Framers guarded against. This Court should affirm the district court's finding that the APCIA violates the dormant Commerce Clause and therefore must be invalidated. While the district court correctly found the APCIA to be unconstitutional, it did so solely based on a *Pike* balancing test analysis. This Court should invalidate the APCIA both because of *Pike* and because it is discriminatory.

A. <u>The standard of review is *de novo.*</u>

The court reviews a district court's grant of summary judgment de novo. *Tufariello v. Long Island R.R. Co.,* 458 F.3d 80, 85 (2d Cir.2006), including when the district court's decision raises questions of constitutional interpretation. *United States v. Moskowitz,* 215 F.3d 265, 268 (2d Cir.2000).

B. <u>The APCIA unconstitutionally discriminates against interstate commerce.</u>

The APCIA promotes New York farms while burdening farms from other states that wish to serve the New York market. In the dormant Commerce Clause context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc.*, 511 U.S. at 99; *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273 (1988).

Such discriminatory laws motivated by "simple economic protectionism" are virtually *per se* invalid, *City of Philadelphia,* 437 U.S. at 624, and will withstand judicial scrutiny only if the State can show no other means to advance a legitimate local purpose. *Maine v. Taylor,* 477 U.S. 131, 138 (1986).

1. The APCIA discriminates against interstate commerce because it benefits New York farms and burdens out-of-state farms.

The district court found that because the information on the placard applies to all animal products sold in New York and because New York retailers are responsible for displaying the placard, that the law "treats both intrastate and interstate animal products equally." (R. 18). However, the Supreme Court has made clear that the heart of the discrimination inquiry is not what words the New York legislature chose to use, but whether there will be a disparate impact on out-of-state farms who seek to serve the New York market. *Associated Indus. of Missouri v. Lohman,* 511 U.S. 641, 654 (1994) ("We repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in 'effect.'").

The APCIA is discriminatory in effect in two ways. First, the statute explicitly requires that the placard direct consumers to a website which only includes New York farms in its list of environmentally sustainable and humane farms. By only directing consumers to farms located in New York, the state is promoting the purchase of in-state products over the purchase of out-of-state products, without a compelling showing of how such promotion furthers the goal of providing information about the negative effects of animal agriculture. Since the APCIA's goal of educating consumers is not dependent on promoting New York farms, the statute crosses the line into economic favoritism. As

the Supreme Court has established, "when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of 'simple economic protectionism.'" *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 343 (2007) (quoting *Wyoming v. Oklahoma,* 502 U.S. 437, 454 (1992)).

Second, the reduction of animal product sales will not, as the district court predicts, likely occur from both intra-state and out-of-state sources equally. If consumers are persuaded to reduce their consumption of animal products based on the information provided on the placard, it is likely that they will choose to purchase from businesses promoted on the New York website, since those are the ones held out to meet the desirable standards. Therefore, out of state sources will indeed be affected more deeply by any reduction in sales, for the sole reason that they are not based on New York.

2. The APCIA does not withstand heightened judicial scrutiny.

Because the APCIA discriminates against interstate commerce, the burden shifts to the state to show that the discrimination is "demonstrably justified." *Chem. Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334, 344 (2009). The law will be declared *per se* unconstitutional unless it can be shown under "rigorous scrutiny" that there are no other available means to advance a legitimate local interest. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994) (citing *Taylor*, 477 U.S. at 151-52). The court may only uphold the APCIA upon a finding "based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable." *Granholm*, 544 U.S. at 492–93.

The district court found that the APCIA advances a legitimate local interest because it seeks to "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." (R. 3). However, if "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). Here, the APCIA's purported goals do not have a sufficient connection to the actions it requires.

The Supreme Court has found that a purported health or safety rationale may be illusory when then the true underlying motivation is economic protectionism. *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 686 (1981). In *Kassel,* a state statute that prohibited the use of 65-foot double-trailer trucks within its borders was unconstitutional because there was no evidence proving that single trailers were actually any safer than the double trailers. *Id.* at 673-74.[9] In numerous other cases, the Court has consistently held that if illegitimate means are used to isolate a state from the national economy, the legislation is constitutionally invalid despite having a presumably legitimate goal. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 522-24 (1935) (invalidating legislation to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1, 10 (1928) (challenging the validity of a law aimed to create jobs by keeping industry within

[9] Justice Powell, in the plurality opinion, deferred to the lower courts' findings refuting the assertions regarding safety justifications for the longer double-trailer ban, concluded that the traditional deference warranted by a state in implementing a law regarding safety should not be accorded, and then balanced these "illusory" safety considerations with the considerable burden imposed on interstate commerce. *Kassel*, 450 U.S. at 678. Justice Brennan, while concurring in the judgment, did not think the court should engage in a factual inquiry as to whether the "65-foot doubles are more dangerous than shorter trucks," but still concluded that this was "protectionist legislation" that was unconstitutional under the Commerce Clause, even if the burdens and benefits were related to safety rather than economics. *Id.* at 680.

the state); *Edwards v. California,* 314 U.S. 160, 173-74 (1941) (reversing a conviction for violating a statute aimed at preserving the state's financial resources from depletion by fencing out indigent immigrants).

In the present case, the State fails to show that a placard requirement will lead to a reduction in state health care and environmental costs. Simply asserting that "better educated consumers" will buy environmentally friendly products that don't involve animal cruelty is not sufficient to justify the state's impact on interstate commerce. *Kassel,* 450 U.S. at 671 ("When state legislation offers no real health or safety benefits to its citizenry, the law cannot stand when it interferes with interstate commerce.") *See also Raymond Motor Transp., Inc. v. Rice,* 434 U.S. 429, 445 (1978) (holding that regulations violated the dormant Commerce Clause when they imposed a substantial burden on the interstate movement of goods and interfered with the flow and speed of interstate truck transportation, and the state failed to show that the regulations contributed to safety). The State does not claim that New York farms are of a higher quality than out-of-state farms. Nor does it point to any studies showing that distinguishing between the place of origin of food is helpful to accurately inform consumers about potential environmental and health considerations.[10] *See* N.Y. Agric. & Mkts. Law § 1000. Instead, this case is like others where the Supreme Court has determined that the local interest which the statute

[10] The facts of this case are quite different than those involving consumer "right to know" laws, where courts have found that a state had a legitimate interest in informing consumers about the origin and contents of the food they were buying. *See, e.g., Grocery Mfrs. of Am., Inc. v. Gerace,* 755 F.2d 993 (2d Cir. 1985) aff'd sub nom. *Gerace v. Grocery Manufacturers of Am., Inc.,* 474 U.S. 801 (1985) (finding a legitimate state interest in permitting consumers to discern whether they were buying real cheese); *Dean Foods Co. v. Wisconsin Dept. of Agric., Trade & Consumer Prot.*, 478 F. Supp. 224, 230 (W.D. Wis. 1979) on reargument sub nom. *Dean Foods Co. v. Wisconsin Dept. of Agric.*, 504 F. Supp. 520 (W.D. Wis. 1980) (holding that consumers have a right to make informed choices between chocolate milk and a nutritious chocolate drink).

actually seeks to protect is the economic interest of local growers and producers to be free from out-of-state competition. *See, e.g., Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 349 (1977) (finding that the State's assertion that the act was enacted to guard against consumer fraud and deception was not the true motivation of the legislation). The Court has consistently found this type of exercise of police power to violate the Commerce Clause. *E.g., Baldwin*, 294 U.S. 511; *Pike*, 397 U.S. 137; *H.P. Hood & Sons, Inc.*, 366 U.S. 525; *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361 (1964). No matter how compelling the APCIA's purpose may appear, "the commerce clause forbids discrimination, whether forthright or ingenious." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). The mere fact of non-residence cannot foreclose a producer in one state from access to market in other states. *H.P. Hood & Sons, Inc.* at 539. As Justice Jackson eloquently stated, "[O]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation…such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." *Id.* at 539. The APCIA denies out of state farms this "free access."

Finally, the State cannot demonstrate the "unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt,* 432 U.S. at 353. In *Maine v. Taylor,* a ban on the importation of live baitfish was upheld because the State had a legitimate concern about the effects the baitfish parasites would have on the State's unique population of wild fish and demonstrated the lack of other options to address its concern. 477 U.S. at 150. Given that testing procedures for baitfish parasites had not yet

been devised, the Supreme Court found that the "abstract possibility" of developing acceptable testing procedures, particularly when there was no assurance as to their effectiveness, did not make those procedures an "available nondiscriminatory alternative" for purposes of the Commerce Clause. *Id.* at 147.

Here, however, the State has made no such showing. The State argues that the information on New York farms was already available and that it would increase costs to the New York Department of Agriculture and Markets to gather information from farms outside of the state and analyze them under New York environmental and welfare standards. (R. 20). However, convenience and cost alone cannot provide a justification for violating the Constitution, which is not a document "prescribing limits, and declaring that those limits may be passed at pleasure." *Marbury v. Madison*, 5 U.S. 137, 178 (1803). The State fails to meet its burden of showing no reasonable alternative is available. Therefore, this court should hold that the APCIA is unconstitutional.

C. <u>The APCIA is unconstitutional because it fails the *Pike* test.</u>

Even if this court finds the APCIA to be non-discriminatory, it should strike down the statute because a statute is unconstitutional when the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). The APCIA has the direct effect of placing out-of-state animal agricultural business interests at a disadvantage in marketing their products to New York consumers. Such a severe burden on interstate commerce cannot be justified by the local interests alleged to be at stake, especially because the court must look to whether any local interest could be equally served with less of an impact on

interstate commerce. *Id.; see also, Great Atl. & Pac. Tea Co., Inc. v. Cottrell,* 424 U.S. 366*,* 372 (1976).

1. The APCIA imposes a burden on interstate commerce that is excessive in comparison to the local interests it purports to serve.

Under *Pike*, the court's analysis "necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Pike,* 397 U.S. at 142; *Raymond Motor Transp., Inc.,* 434 U.S. at 441. Here, the burden on interstate commerce imposed by the APCIA outweighs the governmental interests asserted.

As the district court noted, a state has an important local interest in promoting the "health of its citizens, the environment, and farm animals." (R. 20). *See, e.g., Maine v. Taylor,* 477 U.S. 131 (1986) (finding a legitimate state interest in guarding against environmental risks from parasites residing foreign baitfish). However, the balancing test requires that even if the court finds these to be legitimate interests, they must be weighed against the burden the statute imposes on interstate commerce. *Pike,* 397 U.S. at 142. To hold otherwise "would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951).

In *Hunt v. Washington State Apple Adver. Comm'n,* the Supreme Court found that the interstate market for apple growing and production was significantly burdened by a North Carolina labeling requirement that forced Washington apple growers to use the United States Department of Agriculture grading system. 432 U.S. 333 (1977). While the statute was facially neutral, applying the same standard to apples grown in North

Carolina and elsewhere, it had the practical effect of discriminating against Washington apple growers, who had their own grading system that reflected higher quality standards. *Id.* at 350. North Carolina growers and dealers faced far less of a burden in complying with the law, while the statute unduly burdened out-of-state growers by decreasing the demand for Washington State apples and raising their costs of doing business. *Id.* Similarly, the Arizona statute in *Pike* was found to unduly burden the plaintiff, who was engaged in extensive farming operations in Arizona, when it prohibited the plaintiff from shipping cantaloupes in open containers to a plant in California. 397 U.S. 137.

Here, the burden of the placard requirement is significant. The APCIA would require the placard to accompany every retail sales display, vending machine, bulk container, food establishment, or other public eating place where "animal products intended for human consumption are offered for sale." Indeed, it is hard to imagine anywhere where food is sold, except for a vegan restaurant, where this placard would not be found—New York consumers would probably see these placards multiple times a day, in every ice cream shop, movie theater, convenience store, candy machine, airport terminal, grocery store, and restaurant. Every time, the consumer would be referred to a website that promotes farms in New York only, to the exclusion of farms in forty-nine other states. The website would have the effect, like the apple labels, of providing a benefit to local farms, while burdening out of state growers. In fact, the effect here will be more severe, because there is apparently nothing that out-of-state farmers can ever do to be included on the website's list.

The Supreme Court has been wary of state regulation that places a burden on citizens in other states because citizens in other states do not have access to the political

processes of the state that is placing a burden upon them. *See, e.g.*, *W. Lynn Creamery, Inc. v. Healy,* 512 U.S. 186 (1994) (holding that Massachusetts's milk tax was unconstitutional in part because its purpose and effect was to benefit local dairy producers and the interests of out-of-state dairy producers were not adequately represented in Massachusetts's political process). Here, the New York state government seeks to burden farms throughout the country.

2. New York's interest could be equally served with less of an impact on interstate commerce.

Finally, the APCIA must be invalidated because, as the district court correctly noted, there are "numerous ways New York could promote the same interests with a 'lesser impact." (R. 20). The *Pike* test requires a final inquiry as to whether that local interest "could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142. It is not the court's role to determine *which* of the alternatives is best suited to achieve the state's objective. *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 524 (1959). However, the fact that reasonable alternatives to the APCIA exist indicates that the statute as it stands is unconstitutional. The State could have established a process for farms nationwide to submit their information to the website. It could have provided links from the website to farms' own websites promoting their sustainable practices. Or, as the district court noted, the State could have simply refrained from promoting individual farms.

In *Dean Milk Co.,* the Supreme Court invalidated a city ordinance regulating the sale of milk and milk products within the municipality's jurisdiction, because "to permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of

preferential trade areas destructive of the very purpose of the Commerce Clause." 340 U.S. at 356. Here, the APCIA tempts every state to come up with its own regulatory scheme that exclusively promotes its own local businesses. This Court should follow Supreme Court precedence and invalidate the APCIA to avoid this result.

CONCLUSION

The district court erroneously held that the FMIA does not preempt the APCIA as applied in this case. The district court's decision on the issue of preemption must be reversed. The district court correctly determined that the APCIA violates the Commerce Clause. That decision must be affirmed, both for the reasons stated by the district court and because the APCIA discriminates against interstate commerce. The district court's grant of Plaintiff/Appellee's motion for summary judgment must be affirmed.