No. CV 11-55440

IN THE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE, et al.,

Appellants,

v.

NATIONAL MEAT PRODUCERS ASSOCIATION,

Appellee.

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

BRIEF FOR APPELLANTS

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STATEMENT OF THE ISSUES

I. Does the Federal Meat Inspection Act preempt New York's Animal Products Consumer Information Act?

II. Does the Animal Products Consumer Information Act exceed congressional authority under the Commerce Clause of the U.S. Constitution?

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. The NMPA alleges that the Animal Products Consumer Information Act (APCIA), N.Y. Agric. & Mkts. Law § 1000, is unconstitutional as applied to beef and pork products and seeks declaratory judgment and injunctive relief. R. at 1. Specifically, the complaint alleges that the Commissioner of the New York State Department of Agriculture and Markets and the New York State Department of Agriculture and Markets (collectively "New York") violated the Supremacy Clause as well as the Commerce Clause by enacting the APCIA. R. at 2.

The NMPA filed a motion for summary judgment under Fed. R. Civ. Pro. 56. R. at 2. On September 15, 2012, the district court granted the NMPA's motion for summary judgment. R. at 21. The court held: (1) The APCIA was not preempted by the Federal Meat Inspection Act; (2) the APCIA violated the Commerce Clause and thus was unconstitutional. R. at 18-21.

New York filed a notice of appeal. New York appeals the district court's grant of the NMPA's motion for summary judgment. This court granted review.

STATEMENT OF THE FACTS

In 2010, the New York legislature passed the APCIA in order 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. Recognizing that improving the health of its citizens and protecting natural resources would lead to long-term well being and financial stability in the state, the legislature examined numerous ways to improve public and environmental health in New York. R. at 3.

The legislature heard numerous proposals on how human and environmental health could be improved. In particular, the overwhelming evidence presented on the connection between decreased meat consumption and improved human and environmental health was particularly convincing to the legislature. R. at 3. Furthermore, during the hearings examining the implications of the consumption of meat on the environment and public health, the legislature also recognized improved animal welfare as an additional goal of the state. The impetus was hearing about the horrifying conditions for animals raised on large-scale industrial animal farms. R. at 3. Realizing they could make real strides in improving the public and environmental health as well as animal welfare in the state by reducing meat consumption, they deciding to enact an educational campaign to inform consumers. R. at 3.

The APCIA requires vendors of animal products in the state of New York to display a public-interest placard which contains a warning about the human and environmental health implications as well as the animal welfare implication of a meat-based diet.

Additionally, the placard references a URL to a state sponsored website, www.informedchoice.ny.gov. R. at 4. This website contains a myriad of information for consumers to enable them to make educated consumer choices. The website includes research about the environmental impacts of meat-based diets, industrial agriculture and public health issues. R. at 4. In addition, the website contains a page that lists New York farms certified as being environmentally sustainable and employing humane welfare standards. R. at 4.

STANDARD OF REVIEW

Summary judgment is granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). This court reviews the district court's conclusion of law, that the APCIA is unconstitutional under the commerce clause, *de novo. Colon v. Coughlin,* 58 F.3d 865, 871 (2d Cir. 1995). The facts are reviewed in the light most favorable to the non-movant, the Commissioner of the New York State Department of Agriculture and Markets and the New York State Department of Agriculture and Markets. *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001).

SUMMARY OF THE ARGUMENT

The Federal Meat Inspection Act does not preempt New York's Animal Products Consumer Act. When the state of New York enacted the APCIA, it exercised its historic police powers. When this is the case, the ordinary presumption against preemption of state law is at its peak. The FMIA neither expressly or impliedly preempts the APCIA and therefore, should be upheld under the Supremacy Clause of the Constitution.

The scope of the FMIA's express preemption provision does not clearly and manifestly encompass the APCIA for five primary reasons. First, New York's public-interest placards are not "labeling" under the FMIA because they only convey broad generalities about animal-related issues, not particularized information about specific articles of meat. Second, the APCIA's public-interest placards convey generalities about broad issues relating to animal-product agriculture and consumption. Third, the textual structure of the FMIA reveals that its label and labeling scheme is intended to convey particularized information about specific articles of meat. Fourth, Supreme Court precedent indicates that labeling under the FMIA must supplement or explain a specific article. Fifth, the Second Circuit precedent interpreting the definition of "labeling" under a statute with a nearly identical definition indicates that written material "accompanying" an article must convey particularized information about that specific article. Therefore, this court should correct or clarify the district court's overbroad ruling that APCIA public-interest warnings are "labeling" under the FMIA. Additionally, the word "accompanying" is ambiguous at best in this instance, and thus cannot be relied upon to surmount the presumption against preemption.

The FMIA also does not impliedly preempt the APCIA. The savings clause in the FMIA's preemption provision obviates the need for an inquiry into implied preemption. Furthermore, the FMIA does not impliedly preempt the APCIA for three reasons. First, the FMIA does not preempt the entire the field of meat regulation. Second, compliance both the FMIA and APCIA is not physically impossible. Lastly, the APCIA does not stand as an obstacle to the effectuation of the FMIA's purpose.

The state of New York enacted the Animal Products Consumer Information Act, requiring vendors of animal products to place public-interest placards at establishments where these products are sold, to educate consumers about the public health, environmental and animal welfare consequences of an animal-based diet. These goals were lauded by the district court as "important local interests." R. at 20.

The APCIA is a valid exercise of the state's police power to legislate to protect the public health, safety and welfare of its citizens. It does not violate the commerce clause because (1) it is not discriminatory facially nor in-effect and (2) the benefits of the law outweigh the burdens. On its face and in-effect, the APCIA regulates evenhandedly. The statute subjects all New York vendors to the same labeling requirements. Furthermore, the statute creates no barriers to incoming interstate commerce. Therefore, the statute is not subject to strict scrutiny.

Since the statute evenhandedly regulates, it should be analyzed under the balancing test set forth in *Pike v. Bruch Church, Inc.*, 397 U.S. 137, 142 (1970). Under *Pike,* the APCIA does not violate the commerce clause because the incidental burdens produced by the statute are not "clearly excessive in relation to the putative local benefits." *Id*. The district court erred in its application of the *Pike* balancing test in two ways. First, the court failed to weigh the benefits of the statute against the burdens, as *Pike* requires. Second, the court found the possibility that legislature could have met its goals through less discriminatory means dispositive. The court's exclusive reliance on this factor goes against Supreme Court precedent.

By educating consumers about the public health, environmental and animal welfare impacts of their dietary choices, the APCIA serves a legitimate public purpose.

The de minimis burden the statute places on out-of state meat producers by referencing an educational website that includes a list of New York farms that meet New York's environmental and welfare certification requirements is not clearly excessive in relation to the local benefit furthered by the statute.

ARGUMENT

I. THE FEDERAL MEAT INSPECTION ACT DOES NOT PREEMPT NEW YORK'S ANIMAL PRODUCTS CONSUMER INFORMATION ACT.

The meat industry's weapon of choice in this constitutional challenge is, ironically, the Federal Meat Inspection Act (FMIA)—a law enacted by Congress following public revelations (and outrage) over abominable conditions in the meatpacking industry. *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 967 (2012). Today, over a century later, the NMPA is attempting to turn the FMIA against those who would disseminate information about the meat packing industry. The NMPA now contends that the FMIA is a gag, which stifles New York's ability to disseminate information to its citizens about the well-documented moral, environmental, and chronic-health consequences of meat consumption. *See* Cecelia Tichi, *Exposés and Excess: Muckraking in America, 1900/2000* 1–2 (2004) ("From *The Jungle* to *Fast Food Nation*: American Déjà Vu").

The Supremacy Clause provides that federal laws are the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. Accordingly, where state and federal law conflict, federal law governs. *McCulloch v. Maryland*, 17 U.S. 316 (1819). Congressional intent is the "ultimate touchstone" when determining whether, and to what extent, a federal law preempts state law. *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 103 (1963). Congressional intent to save or preempt state law may be expressly

stated in the statute's text, or implicit in the statute's structure and purpose. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Whatever the form, congressional intent to preempt state law must be "clear and manifest"—mere ambiguity will not suffice. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

This court should affirm the district court's judgment that the FMIA does not preempt New York's APCIA. Such a holding would be consistent with (A) the strong presumption that Congress does not intend to preempt state laws enacted under a state's traditional police powers, (B) the limited scope of the FMIA's express preemption provision, (C) that preemption provision's savings clause, and (D) the absence of indicia that Congress impliedly intended to preempt state laws like the APCIA.

A. Because the APCIA is an exercise of New York's historic police powers, the ordinary presumption against preemption of state law is at its zenith.

Our federalist system of government operates to "preserve the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). This respect for state sovereignty is not just an "end in itself," but is a fundamental mechanism of securing individual liberty. *New York v. United States*, 505 U.S. 144, 181 (1992). As the Supreme Court recently noted:

> Federalism . . . allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.

Bond, 131 S. Ct. at 2364. Accordingly, any Supremacy Clause analysis "starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Only the "clear and manifest purpose of Congress"

can overcome the presumption against preemption. *Cipollone*, 505 U.S. at 516 (citing *Rice*, 331 U.S. at 230). By contrast, courts undermine state sovereignty when they "give the state-displacing weight of federal law to mere congressional *ambiguity*." *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (emphasis in original) (quoting Laurence H. Tribe, *American Constitutional Law* § 6-25, 480 (2d ed. 1988)) (declining to preempt state law on Commerce Clause grounds).

This presumption against preemption is "particularly" pronounced in areas of law "which the States have traditionally occupied, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), even when Congress has regulated in the same area for a long period of time. *Wyeth v. Levine*, 555 U.S. 555, 565 & n.3 (2009) ("more than a century" of federal drug-label regulation did not undermine the presumption against preemption).

New York's APCIA is concerned with public health, the environment, and animal welfare. *See* N.Y. Agric. & Mkts. Law § 1000.4(1) (message on alerts warns about "chronic diseases," "source[s] of pollution," and "animal suffering"). Accordingly, the state law falls squarely within the field of regulation traditionally inhabited by the States, and entitled to the highest presumption against preemption. Health and safety matters, of course, are the prototypical issue of traditional state concern. *See Hillsborough Cnty., Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 719 (1985). Pollution abatement also falls within the exercise of "even the most traditional concept" of the historic police power. *See Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960) (air pollution); *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 343 (1973) (water pollution). And the APCIA's concerns about animal welfare similarly fall within the state's police power, with a particularly extensive pedigree in New York.

Sentell v. New Orleans & C.R. Co., 166 U.S. 698 (1897); *Fox v. Mohawk & H. R. Humane Soc'y*, 59 N.E. 353, 354 (N.Y. 1901) (analyzing state animal cruelty law).

Finally, in enacting the APCIA, New York not only legislated within areas of historically local concern, but did so with an extremely light regulatory touch. Rather than directly regulate on these issues of traditional concern, the Act operates solely by providing generalized information to New York citizens. *See Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (a state "may seek to disseminate information so as to enable its citizens to make better informed decisions").

But the NMPA has beef with even this banal exercise of state authority. *Cf. Va Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976) (noting that "on close inspection" ban on informing consumers about drug prices rested "in large measure on the advantages of [citizens] being kept in ignorance"). Such a severe encroachment on the state sovereignty and individual liberty must not be taken lightly. The "strong presumption against preemption" of laws like the APCIA requires this court to "narrowly construe" the preemptive effect of the FMIA. *See Cipollone*, 505 U.S. at 523 (plurality opinion).

B. The scope of the FMIA's express preemption provision does not clearly and manifestly encompass the APCIA.

The clearest expression of congressional intent to preempt occurs under the doctrine of "express preemption," when Congress expressly states its intent to preempt state law in the text of the statute. When a statute contains an express preemption clause, statutory construction must begin with the language of the clause itself, which "necessarily contains best evidence of Congress's pre-emptive intent." *CSX Transp., Inc.*

v. Easterwood, 507 U.S. 658, 664 (1993). In relevant part, the FMIA's preemption provision states that:

> 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.[1]

21 U.S.C. § 678 (2006) (emphasis added). Because the APCIA does not establish marking, packaging, or ingredient requirements, express preemption turns on whether the Act's public-interest placards constitute "labeling" under the FMIA. *See id.*

The FMIA defines "labeling" as, "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." *Id.* § 601(p). "Labels," in turn, are printed material "upon the immediate container . . . of any article."[2] *Id.* § 601(*o*). Because the public-interest placards are not located "upon" any article of meat, or any article's container or wrapper, the FMIA only preempts the placards if they are printed material "*accompanying* such [an] article." *Id.* § 601(p) (emphasis added).

This court should either hold that (1) the FMIA's definition of labeling does not encompass the generalized information conveyed by the APCIA's public-interest placards or, alternatively, (2) as applied to the public-interest placards, the ambiguous word "accompanying" is insufficiently clear to too ambiguous to overcome the strong presumption against preemption.

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[1] In addition to marking, labeling, packaging, and ingredient requirements, the provision also preempts certain state regulation of the "premises, facilities and operations" of slaughterhouses and other establishments not of relevance here. *See* 21 U.S.C. § 678.

[2] Matter on the package liner is expressly excluded from the definition of label. *See* 21 U.S.C. § 601(*o*).

1. New York's public-interest placards are not "labeling" under the FMIA because they only convey broad generalities about animal-related issues, not particularized information about specific articles of meat.

When determining the scope of congressional intent to preempt, courts must conduct a "careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute and regulations." *Medtronic*, 518 U.S. at 500. Thus, for example, a plurality of the Supreme Court considered whether a state-law claim alleging conspiracy to misrepresent the health hazards of cigarette smoking was *nominally* "based on smoking and health"—and thus preempted by federal law—a more careful comparison found that the state-law claim more accurately fell within the scope of "more general" claims regarding fraud. *Cipollone*, 505 U.S. at 528–29 (plurality opinion) (interpreting the Federal Cigarette Labeling and Advertising Act).

Similarly, while the information requirements of the APCIA and FMIA both relate to meat consumption, a more careful analysis reveals that the statutes share little in common beyond their mutual recognition that animal products exist: The APCIA's public-interest placards are concerned with broad statements about "animal agriculture and the consumption of animal products" in general, N.Y. Agric. & Mkts. Law § 1000.3, while labeling under the FMIA conveys particularized information about the characteristics of a specific article of meat that the labeling is "accompanying" or "upon." 21 U.S.C. § 601(p) ("such [an] article").

a. The APCIA's public-interest placards convey generalities about broad issues relating to animal-product agriculture and consumption.

The express purpose of the APCIA is to protect New York citizens by "providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively affects health, the environment, and imposes unnecessary suffering on animals." N.Y. Agric. & Mkts. Law § 1000.3. The Act's public-interest warnings are its only mechanism for accomplishing this goal. *See id.* § 1000.4(1).

But the text of these placards is wholly unconcerned with the specific characteristics of meat products nearby. Under the Act, the same statement concerning the chronic-health, environmental, and moral consequences of animal agriculture and animal consumption must appear wherever any meat, fish, dairy, or eggs are sold for human consumption. *See id*. Accordingly, a farmer's market only selling meat from *small-scale* agriculture must nevertheless display a warning that "[i]ndustrial agriculture is . . . a major source of pollution." *Id*. And a pescetarian restaurant must nevertheless display the warning that "[a]nimal handling techniques . . . lead to animal suffering," *id.*, despite the absence of piscine-welfare concerns in the Act's legislative history. *See* Rollin Aff. add. B (describing cruelty concerns only for beef, swine, dairy, veal, and poultry).

The APCIA's lack of concern for specific products is further manifested by the fact that the names of sustainable- and humane-certified New York farms are only accessible through the accompanying web address, rather than listed on the placard itself. R. at 19. In an analogous California case involving generalized toxic-product signs that did not identify any specific products on the sign itself, but rather included a toll-free number that consumers could call to find out if a specific product contained toxins, the court held that the signs did not provide the clear and reasonable warnings about carcinogens. *Ingredient Commc'n Council, Inc. v. Lungren*, 4 Cal. Rptr. 2d 216, 225 (Cal.

Ct. App. 1992) ("in the absence of a specific warning, most consumers assume the products they buy are safe").

If the APCIA was concerned with conveying particularized information about specific articles of meat, its placards would expressly include that information or display tailored messages depending on the animal products each sign purported "accompanied." But the placards include neither.

b. The district court's interpretation of "accompanying" is overly broad, and should be corrected.

An interpretation of labeling that includes all printed material located near a product that is intended to convey information relating to that product, as the district court erroneously held, R. at 10, ignores the content of the APCIA's public interest alerts. Furthermore, if the intent to "convey[] information" about meat is "labeling" under the FMIA, then the Act would displace all written information in the meat aisle—including materials pamphlets containing meat-recipes, placards promoting barbecue safety, or even the "meat aisle" sign itself. *Cf. N.Y. State Pesticide Coal., Inc. v. Jorling*, 874 F.2d 115, 120 (2d Cir. 1989) (noting EPA's refusal to strictly interpret "accompanying" under FIFRA in a way that would encompass within pesticide labeling "clearly extraneous material" such as the logo on an applicator's hat or the license plate on a pesticide-transport vehicle). Courts should avoid absurd interpretations of a statute when reasonable alternative exist. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). A fair, narrowly construed reading of the FMIA reveals that "accompanying" material preempted under the Act conveys particularized information about specific articles meat. Accordingly, the APCIA placards are not expressly preempted.

c. The FMIA's text and regulations indicate that its label and labeling scheme conveys particularized information about specific articles of meat, not general public-service-style messages.

Courts may look to the textual structure of a statute when interpreting its preemption provision. *Kordel v. United States*, 335 U.S. 345, 349 (1948); *accord Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 623–24 (2d Cir. 1992). The textual structure of the FMIA reveals that its labels and labeling convey information about particularized characteristics of individual articles of meat, such as whether the item is safe to eat. *See, e.g.*, 21 U.S.C. § 607(a) (describing labeling requirements regarding whether an individual "product" has been properly inspected). USDA regulations implementing the FMIA are similarly concerned with the specific characteristics of individual articles of meat. *See, e.g.*, 9 C.F.R. § 424.22(c)(4) (2010) (whether article has been irradiated); *id.* § 441.10 (percentage of water retained in article "from post-evisceration processing"). Indeed, if "labeling" actually encompasses all information relating to meat in any generalized way, it is strange that Congress would only authorize the USDA "to regulate . . . labeling . . . to prevent the use of any *false or misleading*" information. U.S. Dep't of Agric., *A Guide to Federal Food Labeling Requirements for Meat and Poultry Products* 4–5 (R. Post et al., eds. 2007); 21 U.S.C. § 607(c)–(e).

d. Supreme Court precedent indicates that labeling under the FMIA must supplement or explain a specific article.

The only Supreme Court case evaluating labeling preemption under the FMIA, *Jones v. Rath Packing Co.*, held that federal standards regarding the weight of bacon displayed on containers preempted conflicting state standards. 430 U.S. at 530–32. Because the weight information was displayed directly on the article's container, the Court quickly concluded that the state-mandated information was preempted labeling

under the FMIA. *Id.* at 532 & n.21 (citing 21 U.S.C. § 601(p)). The Court took the time, however, to expressly reject a contention that "labeling" under the FMIA turned solely on the placement and format of that information, rather than its content. *Id.* at 532.

The definition of "labeling" under the FMIA was adopted, verbatim, from the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 321(m) (2006). *See* S. Rep. No. 90-799, at 10 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2188, 2196 (noting that Congress purposefully imported the FDCA definition to the FMIA). Accordingly, congressional intent with regard to the FDCA's labeling definition, 21 U.S.C. § 321(m), is highly probative of congressional intent with regard labeling under the FMIA. *Am. Meat Inst. v. Ball*, 424 F. Supp. 758, 766 (W.D. Mich. 1976).

Supreme Court precedent interpreting the word "accompanying" under the FDCA indicates that written material "accompanying" an article must bear a direct, textual relationship to that article. *Kordel*, 335 U.S. at 350. In *Kordel v. United States,* the Court considered whether literature explaining how to use that a vitamin product constituted written material "accompanying" the vitamins, even though the manufacturer sent the literature and vitamins under separate cover. *Id.* at 347.

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. The important consideration was the items' "textual relationship," not their physical relationship. *Id.* The accompanying literature was "an essential supplement" to information contained on the product, making the two items "interdependent." *Id.* at 348; *accord United States v. Urbuteit*, 335 U.S. 355, 357 (1948).

But while the *Kordel* literature explained how to a specific vitamin product in the way that committee reports explain and supplement specific bills, the APCIA notices do not provide information about any specific article of meat. Rather, they provide information about animal products *in general*, in the same way that—borrowing the Court's analogy—Senate rules might explain what a "bill" is in general, without "accompanying" any specific bill like a committee report.

Other courts have relied on *Kordel* to similarly find that point-of-sale are signs preempted "accompany" accompany matter when those signs provide information that supplements or explains the specific item. For example, a California court recently relied on *Kordel* to find that the FMIA preempted point-of-sale warnings required by law "to specify that '[*t*]*his product* contains a chemical known to the State of California' to be a carcinogen or a reproductive toxin.'" *Am. Meat Inst. v. Leeman*, 102 Cal. Rptr. 3d 759, 784 (Cal. Ct. App. 2009) (alteration and emphasis in original) (quoting Cal. Code Regs. tit. 27, § 25603.2(a) (2008)); *accord N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 509 F. Supp. 2d 351, 360 (S.D.N.Y. 2007) (applying same rationale to calorie counts accompanying products on menu boards).

e. Second Circuit precedent interpreting the definition of "labeling" under a similar statutory definition indicates that written material "accompanying" an article must convey particularized information about that specific article.

As this court has noted, *Kordel*'s interpretation of "accompanying" rested on the fact that the written material conveyed specific information about a specific product to a specific end-user. *N.Y. State Pesticide Coal., Inc. v. Jorling*, 874 F.2d 115, 119 (2d Cir. 1989) (citing *Kordel*, 335 U.S. at 348). Accordingly, in a preemption case involving the very similar definition of "labeling" under the Federal Insecticide, Fungicide, and

Rodenticide Act (FIFRA), this court upheld New York regulations requiring pesticide applicators to post warning signs around the perimeter of properties where pesticides were present.[3] *Id.* (interpreting "accompanying" under 7 U.S.C. § 136(p)(2)(A) (2006)). This court noted that although the "key function" of FIFRA's labeling scheme was to "identify and describe the poisonous chemicals," that did not mean FIFRA prohibited all signage identifying or describing poisonous chemicals in any way to any person. *Id*. Because the New York signs were not targeted to the specific end-user of a pesticide, but were rather "minimum warnings to the public at large, they were not "labeling" preempted by FIFRA. *Id.* "To hold otherwise," wrote this court, "would preempt a wide range of state activities which Congress did not subject to the jurisdiction of the EPA." *Id.* at 119–20.

But the district court in this case *did* hold otherwise. The district court concluded that labeling includes "any printed material" displayed near the product "with the intent of conveying information about the product"—no matter how generalized the information is, or how diffuse the intended audience. R. at 10. That holding runs contrary to the considered judgment of this court and should, accordingly, be corrected.

2. The word "accompanying" is ambiguous at best in this instance, and thus cannot be relied upon to surmount the presumption against preemption.

When the text of a preemption provision is ambiguous, courts ordinarily "accept the reading that disfavors preemption." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

[3] In relevant part, FIFRA defines "labeling" to include "all labels and all other written, printed, or graphic matter . . . accompanying the pesticide or device at any time . . . ." 7 U.S.C. § 136(p)(2)(A). "Label," in turn, means "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers . . . ." *Id.* § 136(p)(1) The relevant portion of FIFRA's preemption provision, entitled "Uniformity," states that States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." *Id.* § 136v(b).

The plain meaning of "accompany" provides little clarity. *See Webster's Third New International Dictionary* 21 (Philip Babcock Gove ed., Merriam-Webster 2002) ("accompany" means "to go along with"). Ordinarily, when faced with such ambiguity, courts will look for clarification to the agency charged with implementing the statute. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council*, Inc., 467 U.S. 837, 842–43 (1984). Under the FDCA, for example, courts have looked to regulations from the Department of Health and Human Services for clarity when considering whether menus are "accompanying." *See, e.g.*, *N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 361 n.13.

But the USDA has issued no such clarifying regulations for the FMIA. Instead, USDA has merely issued policy statements indicating that labeling applies to at least some point-of-purchase materials, without providing further clarity. *See, e.g.*, U.S. Dep't of Agric., *A Guide to Federal Food Labeling Requirements for Meat and Poultry Products* 5. However, the persuasiveness of informal, non-binding agency interpretations like these is undermined when an agency has taken inconsistent positions on the issue. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

And USDA has been not been consistent.

USDA has argued in FMIA-litigation that placards are not labels under the FMIA. *See, e.g.*, *Am. Meat Inst. v. Ball*, 550 F. Supp. 285, 288 (W.D. Mich. 1982) *aff'd sub nom. Am. Meat Inst. v. Pridgeon*, 724 F.2d 45 (6th Cir. 1984). And in this circuit, in litigation that found its way to the Supreme Court, the USDA represented that menus and grocery signs are *not* "labeling" under the FMIA. *Grocery Mfrs. of Am., Inc. v. Gerace*, 581 F. Supp. 658, 661 (S.D.N.Y. 1984) *aff'd in part, rev'd in part on other grounds*, 755 F.2d 993 (2d Cir. 1985) *aff'd*, 474 U.S. 801 (1985). On review, this court impliedly took the

USDA at its word and distinguished its analysis between the "New York labeling requirements," which this court found preempted, *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, 1001 (2d Cir. 1985) *aff'd*, 474 U.S. 801 (1985), and the impliedly *non-labeling*, "New York sign, menu and container provisions," which this court upheld. *Id.* at 1003.

USDA's shifting interpretations indicate that, at best, "accompanying" is ambiguous. Until USDA resolves that ambiguity with rulemaking, as Congress intended, this court should decline to find that "accompanying" represents the "clear and manifest" intent of Congress. *Cipollone*, 505 U.S. at 516.

C. The savings clause in the FMIA's preemption provision obviates the need for an inquiry into implied preemption.

When Congress includes a preemption provision "defining the preemptive reach of a statute," as it has done with the FMIA, the implication is that "matters beyond that reach are *not* pre-empted." *Cipollone*, 505 U.S. at 517 (applying expressio unius est exclusio alterius) (emphasis added). Admittedly, the existence of a preemption provision only supports an *inference* against implied preemption, rather than a per se rule. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995); *Toy Mfrs. of Am.*, 986 F.2d at 623–24 (2d Cir. 1992). But if that preemption provision provides a reliable indication of congressional intent to preempt state law, courts need not conduct an analysis into implied congressional intent. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987); *See, e.g.*, *Toy Mfrs. of Am.*, 986 F.2d at 623.

The FMIA's preemption provision includes a savings clause that expressly limits the statute's preemptive effect to matters under the preemption provision:

> 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 other matters regulated under this chapter.

21 U.S.C. § 678; *see* Sandra Zellmer, *Preemption by Stealth*, 45 Hous. L. Rev. 1659, 1661 (2009) ("unlike preemption clauses, savings clauses strike the balance in favor of states"). Savings provisions are broadly construed to in favor of retaining state law. *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (broadly construing savings clause for state sanctions "through licensing and similar laws").

To the extent that this the APCIA placards are not "labeling" under the FMIA—and thus not expressly preempted—this savings clause expressly forecloses any analysis into implied preemption. *See, e.g.*, *Am. Meat Inst. v. Ball*, 424 F. Supp. at 767 (because signs were not preempted "labeling" under the FMIA, they were permitted under the savings clause).

D. The FMIA does not impliedly preempt the APCIA.

Absent express preemption, Congress may impliedly intend to preempt state law in a few limited circumstances. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Implied congressional intent to preempt may occur (1) when Congress has so comprehensively regulated a field that congressional intent to displace state law in that field can be inferred, *Rice*, 331 U.S. at 230; (2) when compliance with both state and federal law is physically impossible, *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–43 (1963); or (3) when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869–74 (2000). The FMIA does not impliedly preempt the APCIA under any of these theories..

1. The FMIA does not preempt the entire the field of meat regulation.

Field preemption requires congressional intent "to occupy a field *exclusively*." *Freightliner Corp.*, 514 U.S. at 287 (1995) (emphasis added). But Congress expressly repudiated such intent in the FMIA's savings clause, which states that the FMIA "*shall not* preclude any State . . . from making requirement or taking other action, consistent with this chapter, *with respect to other matters regulated under this chapter.*" 21 U.S.C. § 678. Although the parties may disagree about what state laws fall within this savings clause, in the very least it evinces congressional intent to not to occupy the entire field. *See Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326, 334 (5th Cir. 2007), *cert denied* 550 U.S. 957 (2007).

2. It is physically possible to comply with both the FMIA and APCIA.

The "demanding defense" of impossibility preemption occurs when it is literally "*physically impossible* . . . to comply with both federal and state requirements." *Wyeth*, 555 U.S. at 573 (emphasis added). Because the USDA has not prohibited New York's public-interest warnings on a misbranding theory or otherwise, it is not physically impossible to comply with both laws. *See id.* (prospect of FDA's future disapproval of drug-label did not make it physical impossible to comply with both laws in the present).

3. The APCIA does not stand as an obstacle to the effectuation of Congress's purpose in enacting the FMIA.

Congress's stated purpose in enacting the FMIA was to protect the "health and welfare of consumers" by ensuring that meat products are not "[u]nwholesome, adulterated, or misbranded . . . ." 21 U.S.C. § 602; *see also* S. Rep. No. 90-799, at 18 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2188, 2209. Because the APCIA does not regulate what type of meat may be sold for human consumption, it does not stand as an

obstacle to these congressional purposes. And in the unlikely event that the APCIA warnings cause consumer confusion or dilute the conspicuousness of FMIA-labels, the USDA is authorized to declare the article misbranded. 21 U.S.C. § 601(n)(6). Finally, to the extent Congress intended to create a uniform labeling system to ensure that interstate meat-shippers did not have to learn myriad state requirements, the APCIA does not interfere with that purpose because it regulates only stationary, intrastate establishments. *See Empacadora de Carnes de Fresnillo, S.A. de C.V.*, 476 F.3d at 334–35.

II. NEW YORK ACTED WELL WITHIN ITS AUTHORITY AS A STATE UNDER THE COMMERCE CLAUSE IN THE PASSAGE OF THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT.

The United States Constitution grants Congress the ability to "regulate Commerce… among the several States…" U.S. Const. art. I, § 8, cl. 3. This positive grant of authority to Congress to regulate interstate commerce has long been recognized as being an implicit or negative limitation on a state's ability to enact laws affecting interstate commerce. *Gibbons v. Ogden*, 22 U.S. 1 (1824). Under the so-called "dormant" commerce clause, a state is limited in its ability to enact laws impacting interstate commerce. *Hughes v. Oklahoma,* 441 U.S. 322, 326 (1979); *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.,* 155 F.3d 59, 74 (2d Cir. 1998). Nevertheless, "in absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *S. Pac. Co. v. Arizona, ex rel. Sullivan,* 325 U.S. 761, 767 (1945).

In order to determine if a law violates the dormant Commerce Clause, the Supreme Court uses a two-tier approach, distinguishing between laws that are

discriminatory either facially or in-effect and laws that have only an incidental effect on interstate commerce. *See e.g. C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389–90 (1994). Laws that are discriminatory facially or in-effect are subject to strict scrutiny and will be struck down unless a state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* at 392-393; *Maine v. Taylor*, 477 U.S. 131, 138–39 (1986). If law regulates neutrally and has only incidental effects on interstate commerce, then a statute is analyzed using a balancing approach. *Pike v. Bruch Church, Inc.*, 397 U.S. 137, 142 (1970).

A. The Animal Products Consumer Information Act is nondiscriminatory

The district court correctly held that the APCIA is not discriminatory. R. at 18. Discriminatory laws favor in-state economic interests to the detriment of out-of-state economic interests. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). Since the APCIA evenhandedly regulates both in-state and out-of-state animal products, it is not discriminatory and therefore, should not be subject to strict scrutiny.

1. The statute is not facially discriminatory

By its express terms, the APCIA neutrally regulates both in-state and out-of state economic interests and therefore, is not discriminatory on its face. A statute is facially discriminatory when it imposes barriers on interstate commerce by its explicit terms. *See, e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 618 (1978) (invalidating a law deemed to be facially discriminatory because it prohibited the importation of "solid or liquid waste which originated or was collected outside the territorial limits of the State"); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (law that placed a surcharge

exclusively on hazardous waste from other states deemed to be discriminatory on its face); *Hughes*, 441 U.S. at 323 (invalidating law for facial discrimination which declared, "[No] person may transport or ship minors for sale outside the state which were…procured within the waters of this state"). Since facially discriminatory laws are motivated by economic protectionism, they are subject to a virtually per se rule of invalidity. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 338 (2007).

The APCIA expressly regulates vendors of animal products within the state of New York. The statute requires vendors who sell animal products to clearly display public-interest placards that provide a "Public Interest Warning" to consumers of animal products. N.Y. Agric. & Mkts. Law §1000.4(1). The statute is wholly different from laws deemed to be facially discriminatory because the statute makes no facial distinction between in-state and out-of state meat products. As the District Court stated, the burden of the regulation falls squarely on vendors of animal products within the state of New York. R. at 18. The statute applies to all establishments within New york where animal products are sold and does not distinguish on the basis of the product's state of origin.

2. The APCIA is not discriminatory in- effect

The APCIA neutrally regulates between interstate and intrastate commerce and therefore, is not discriminatory in-effect. Even if the language of a statute does not explicitly construct barriers between interstate and interstate commerce, a statute can still be discriminatory if it regulates in-state and out-of-state economic interests differently based on geographic origin. In order to determine if a statute is discriminatory in-effect, the focus of the court's inquiry is whether the statute regulates evenhandedly between

intrastate and interstate commerce. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981); *USA Recycling v. Town Bd. of Babylon,* 66 F.3d 1272, 1281 (2d Cir. 1995).

In *Hunt v. Wash. Apple Adver. Comm'n*, the Supreme Court struck down a law deemed to be discriminatory in-effect. The North Carolina law at issue required all apples sent to North Carolina be shipped in boxes with only USDA labels or no labels at all. 432 U.S. 333, 337–38 (1977). Although the law was facially neutral, the law was discriminatory in-effect because the statute had the effect of raising the cost of doing business in North Carolina for Washington apple growers who were directly regulated by the statute but not North Carolina growers. *Id.* at 351. In order to comply with the regulation, Washington growers would have to alter their distribution methods and remove Washington labels from their boxes, a costly endeavor. Yet, the North Carolina growers would not have to alter their distribution practices at all. *Id*. Since in practice, the statute regulated in-state and out-of state producers differently, it was discriminatory in-effect.

Conversely, in *Clover Leaf Creamery Co.,* the Supreme Court held a Minnesota law that prohibited all milk retailers from selling their products in plastic containers was not discriminatory in-effect. 449 U.S. at 471–72. The court distinguished the Minnesota statute at issue from the North Carolina statute deemed discriminatory in *Hunt* based on the critical fact that the statute regulated all milk retailers in the same way. *Id.* at 471. All retailers were prohibited from selling their products in plastic bottles regardless of whether the retailer itself, their bottles or milk were from out-of-state or in-state. *Id.*

Similarly to the statute in *Clover Leaf Creamery Co.,* the APCIA regulates all entities evenhandedly. The statute in-effect does not raise the price of doing business in New York not does it forbid out-of-state animal products from entering the market. The statute simply requires vendors within New York to post a placard at their stores that educates the public as to the environmental, human health and animal welfare implications of consuming animal products. As the district court aptly noted, "[t]he law will likely reduce the overall sale of animal products within New York . . . but the reduction in sales will occur from both intra-state and out-of-state sources equally." R. at 18.

The National Meat Producers Association may argue that the APCIA is discriminatory in-effect because the statute references a New York state government website that includes a page listing farms certified by New York as in accord with environmental and welfare certification requirements. R. at 19. Following this faulty logic, the statute is discriminatory in-effect because it references a website that lists only New York farms. Thus, the statute favors in-state producers of animal products over out-of-state competitors. This argument fails because it fundamentally misunderstands the focus of the discriminatory in-effect inquiry. It wrongly centers the inquiry on the incidental impacts of the regulation as opposed to the impact of the statute on entities it directly regulates.

When determining if a statute is discriminatory in-effect, courts focus on the impact of the statute on those who are directly regulated by it, as opposed to the incidental impacts on other third parties. Specifically, the inquiry is centered on ensuring the regulated entities are not discriminated against on the basis on geographic origin. *See*

e.g. Clover Leaf Creamery Co., 449 U.S. at 471–72 (law deemed not to be discriminatory because all entities were regulated by the statute in the same way, regardless of whether they were in-state or out-of-state); *Grocery Mfrs. of Am., Inc. v. Gerace,* 581 F. Supp. 658, 670 (S.D.N.Y. 1984) *aff'd in part, rev'd in part*, 755 F.2d 993 (2d Cir. 1985) *aff'd*, 474 U.S. 801 (1985) (holding that a statute requiring labeling for imitation cheese was not discriminatory because all food products regulated by the statute are subject to the requirements, regardless of their origin, and therefore, there was "no doubt that the regulations operate even-handedly"); *Nat'l Farmers Org. Irasburg v. Comm'r of Agric., State of Conn.,* 711 F.2d 1156, 1161 (1983) (holding that a Connecticut inspection statute was not discriminatory because those directly regulated by the statute, in-state and out-of-state farmers, were subject to the same requirements. In addition, the cost of the inspection required by statute was the same for in-state and out-of state producers).

The only entities directly regulated by the APCIA are the retail vendors of animal products in New York. The statute itself could not possibly discriminate against out-of state meat producers because they are not even regulated by the statute. Rather, the statute only incidentally impacts these producers. Since the statute regulates evenhandedly, it does not discriminate against interstate commerce, and therefore, the statute should not be subject to strict scrutiny.

B. The benefits of the Animal Products Consumer Information Act outweigh the minimal burden on interstate commerce

A statute that directly regulates evenhandedly can still have incidental effects of interstate commerce. These indirect impacts do not preclude a state from enacting legislation to effectuate a legitimate local interest. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *City of Philadelphia*, 437 U.S. at 623–24 ("Incidental burdens

on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people."). When a state statute is enacted to accomplish a legitimate goal, and only has incidental impacts on interstate commerce, the law must be "upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. By referencing a website with educational information for consumers that included a list of New York farms, the APCIA has an incidental impact on interstate commerce. However, this burden pales in comparison to the environmental, human health and animal welfare benefits derived from the statute.

1. The Animal Products Consumer Information Act effectuates a legitimate public purpose

In order for a law to be upheld under the *Pike* test, it must be designed to "effectuate a legitimate local interest." *Pike,* 397 U.S. at 142. The purpose of the APCIA is to "protect the citizens of [New York] by providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively affects health, the environment, and imposes unnecessary suffering on animals." N.Y. Agric. & Mkts. Law § 1000.3. Dissemination of information, protection of public health, environmental protection and animal welfare have all been recognized as legitimate public interests.

A state is pursuing a legitimate local interest when it seeks to educate its citizens about the implications of their consumer decisions. *See Bigelow*, 421 U.S. at 824 (A state "may seek to disseminate information so as to enable its citizens to make better informed decisions" about their health and welfare). Furthermore, the district court recognized that New York's interest in "promoting the health of its citizens, the environmental, and farm

animals are important local interests." R. at 20. State legislation in the field of public health is one where "the propriety of local regulation has long been recognized." *S. Pac. Co.*, 325 U.S. at 765; *see also Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005). Additionally, environmental protection and animal welfare are seen as legitimate state interests. *See Maine v. Taylor*, 477 U.S. at 148 (1986) (recognizing that states have interest in guarding against environmental harms); *N.Y. State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1307 (2d Cir. 1994) (same); *see also United States v. Stevens,* 130 S. Ct. 1577, 1585 (2010) (acknowledging that animal cruelty has been prohibited by numerous laws).

2. The Burdens Imposed on Interstate Commerce are de minimis.

The "incidental burdens" examined as part of the *Pike* test are the burdens on interstate commerce that exceed those on intrastate commerce. *Clover Leaf Creamery Co*., 449 U.S. at 471–72; *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 50 (2d Cir. 2007). The NMPA contends that the APCIA has a disparate impact on interstate commerce because of it includes a URL in statute's language that subsequently leads to a website that contains a webpage that lists farms certified by the state of New York as in accord with the environmental and welfare standards. R. at 9-15. The inclusion of this webpage is a minor burden on interstate commerce. In order for this statute to have a disparate impact on the interstate market, three generous assumptions must be made. First, an attenuated chain of events must occur for the webpage to have any impact on the interstate market at all. A consumer must read the posted placard, access the URL, sift through the website to the page listing New York farms and remember the names of the farms when making their next meat purchase. Second, it must be assumed that a

consumer would be persuaded that New York certified meat products were superior to the other numerous products that may bear the mark of other certification processes (e.g. USDA organic certification). Third, it must also be assumed that the information on the website, which is specifically aimed at curbing meat consumption all together, does not serve its primary purpose and dissuade the consumer from buying meat products all together. Such a de minimis burden, based on so many assumptions, cannot tip the scales as to outweigh the public health, environmental and animal welfare benefits of the APCIA.

3. The district court erred in its application of the *Pike* balancing test.

In applying the *Pike* balancing test, the district court did not rely on any evidence that the burdens on interstate commerce were excessive when weighed against the immense benefits of this statute. Rather, the district court's holding relied exclusively on the court's determination that there were other ways that New York "could have promoted the same local interests without burdening interstate commerce." R. at 21. The court's reliance solely on this factor as dispositive is misplaced and contrary to the Supreme Court's application of the *Pike* test.

In *Pike,* the Court states "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike,* 397 U.S at 142. Despite the presence of this language in *Pike,* the Supreme Court has repeatedly warned against second-guessing a legislature's means of achieving a legitimate state purpose. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987). In fact, the Supreme Court has never

invalidated a non-discriminatory law based on this factor. E. Chemerinsky, *Constitutional Law: Principles and Policies* §5.3.5, at 424 (2d ed. 2002) (research on subsequent years affirms this assertion). Lower courts have followed suit. Instead of relying on this as a dispositive factor, many courts have interpreted this language as providing an alternative means of determining whether a statute is discriminatory. *See, e.g.*, *Bowman v. Niagara Mach. & Tool Works, Inc.*, 832 F.2d 1052, 1055 n.4 (7th Cir. 1987). Instead of relying on the determination that the legislature could have met the same goals with a less burdensome purpose, the district court should have engaged in balancing the burdens and the benefits of the law itself.

4. The APCIA is constitutional because the incidental burden of the APCIA is not "clearly excessive" in relation to the immense local benefits

Under *Pike,* the NMPA has the burden of proving that the incidental burden on interstate commerce is "clearly excessive" in relation to the local benefits of the APCIA. The Supreme Court has consistently held that there is a heavy thumb of the scale of validity when a state is regulating for its citizens' public health and welfare. *See, e.g.*, *Mintz v. Baldwin,* 289 U.S. 346, 349–50 (1933)*; Kassel*, 450 U.S. at 670 ("Those who would challenge . . . bona fide [state] safety regulations must overcome a strong presumption of validity.") (quoting *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 524 (1959)). In fact, the Second Circuit has found that the burdens of a statute outweighed the benefits only once in the past thirty years. *See Nat'l Farmers Org. Irasburg,* 711 F.2d 1156.

In *National Farmers Organization Irasburg,* this Court held that the burdens of a portion of a Connecticut law regulating inspections of dairy farms outweighed the benefits. 711 F.2d at 1164. The burden imposed by the Connecticut law was substantial.

Due to how the inspection process worked in practice, out-of-state farmers had to wait up to four times longer than their Connecticut counterparts to be inspected to receive a permit to sell milk in Connecticut. *Id.* at 1162. Since their milk could not be sold until inspection was complete, out-of-state producers were hindered by the "prospective loss" resulting from the delay in the inspection process. *Id.* Furthermore, the court found the public health benefits of the statute were wholly "unsupported by record evidence" because there were already analogous regulations in place that had been adopted by most states including the producers in the state challenging the law. *Id.* Since the statute was not furthering a legitimate state interest and imposed substantial burdens, the law was struck down as unconstitutional.

Unlike the law at issue in *National Farmers Organization Irasburg*, the APCIA confers a myriad of legitimate benefits for the citizens of New York and only tangentially burdens out-of-state producers. Therefore, under the *Pike* standard, as interpreted by this court, this law should be upheld as constitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's grant of the summary judgment as to preemption under the FMIA, and reverse the district court's holding with respect to the Commerce Clause.