Case No. CV 11-55440 NCA (ABCx)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Appellants,

v.

NATIONAL MEAT PRODUCERS ASSOCIATION,

Appellee.

Appeal from a Summary Judgment of the United States District Court for the Southern District of New York Honorable Nathaniel C. Alexander

Brief for Appellants, New York State Department of Agriculture and Markets

Team No. 17

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a. Issues for Review

I. Is the Animal Products Consumer Information Act preempted by the Federal Meat Inspection Act?
II. Does the Animal Products Consumer Information Act violate the Commerce Clause of the U.S. Constitution?

b. Procedural History

The matter facing this Court is a challenge to the New York Animal Products Consumer Information Act ("APCIA"), N.Y. Agric. & Mkts. Law § 1000, based on theories of federal preemption and violation of the dormant Commerce Clause. Plaintiff, the National Meat Producers Association ("NMPA"), brought an action for declaratory judgment and injunctive relief in United States District Court for the Southern District of New York to enjoin enforcement of the APCIA. The Honorable Judge Nathaniel C. Alexander granted NMPA's motion for summary judgment on the grounds that, although not preempted by the Federal Meat Inspection Act (21 U.S.C. § 601, et. seq.) ("FMIA"), the APCIA violates the dormant Commerce Clause of the U.S. Constitution. Appellants, the New York State Department of Agriculture and Markets, now bring this timely appeal.

c. Statement of Facts

Intensive confinement, overcrowding, mutilations, long-distance transport, and the slaughter process cause extreme suffering to billions of farmed animals every year in the United States.[1] Animal agriculture is the single largest contributor to greenhouse gas emissions globally, and is responsible for the pollution of thousands of miles of rivers, the release of

[1] *See:* "An HSUS Report: The Welfare of Animals in the Meat, Dairy, and Egg Industries," The Humane Society of the United States (HSUS), http://www.humanesociety.org/assets/pdfs/farm/welfare_overview.pdf (accessed Jan. 10, 2013); *see also*: Dr. Bernard Rollin's Affidavit in Support of Defendant's Reply to Plaintiffs' Motion for Summary Judgment.

noxious gases into the air, and the degradation of rural communities across our country.[2] Excess consumption of animal products is linked to a host of diseases—heart disease, stroke, cancer, diabetes—that sicken and kill millions of Americans every year, and are responsible for billions of dollars in health care costs.[3] Worried about these skyrocketing costs, and seeking to educate its citizen-consumers about these impacts, the state of New York passed a groundbreaking law, the Animal Products Consumer Information Act ("APCIA").

The stated purpose of the APCIA is:

> 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.

To this end, the law provides that anywhere animal products are sold for human consumption a red-on-yellow sign of prescribed size and font must be prominently displayed. Id., § 1000.4.2. The placard must contain the following message:

> PUBLIC INTEREST WARNING: Many chronic diseases, including heart disease, can be largely 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.

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[2] *See:* "Livestock's Long Shadow: Environmental Issues and Options," Food and Agriculture Organization of the U.N. (FAOUN) (2006), ftp://ftp.fao.org/docrep/fao/010/A0701E/A0701E00.pdf (accessed Jan. 10, 2013); "Animal Agriculture and Water Pollution," The Pew Environment Group, http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Fact_Sheet/Animal%20Agriculture%20and%20Water%20Pollution.pdf (accessed Jan. 10, 2013); *see also:* Union of Concerned Scientists' Affidavit in Support of Defendant's Reply to Plaintiffs' Motion for Summary Judgment.

[3] *See:* "The Major Killers of Americans: Research and Prevention," Physicians Committee for Responsible Medicine (PCRM), http://www.pcrm.org/health/health-topics/the-major-killers-of-americans-research-and; "Meat Consumption and Cancer Risk," PCRM, http://www.pcrm.org/health/cancer-resources/diet-cancer/facts/meat-consumption-and-cancer-risk; "Diabetes and Diet: Recipes for Success," PCRM http://www.pcrm.org/health/health-topics/diet-and-diabetes-recipes-for-success (accessed Jan. 10, 2013); *see also*: Dr. Colin T. Campbell's Affidavit in Support of Defendant's Reply to Plaintiffs' Motion for Summary Judgment.

The law applies to retailers, restaurants, and vending machines—any direct seller of animal products intended for human consumption. Id., §§ 1000.4.3-4.4.

To help carry out the purposes of the Act, the Department of Agriculture and Markets created a website, www.informedchoice.ny.gov. This website contains detailed information explaining and supporting the health, environmental, and animal welfare claims made in the text of the statute, including the information provided in the affidavits in support of the Department's reply to NMPA's motion for summary judgment submitted by animal welfare expert Dr. Bernard Rollin, nutrition expert Dr. Colin T. Campbell, and the Union of Concerned Scientists, among others. In addition, the website provides the names of farms located in New York that the Department has assessed and certified as environmentally sustainable and with humane animal welfare standards.

d. Summary of Arguments

First, the APCIA is not preempted by the FMIA. The APCIA is not controlled by the FMIA because its prescribed signage cannot be considered meat "labeling" under the FMIA. Even if a court were to view it as such, however, the New York law still would not be preempted. There is no express preemption because the FMIA's preemption clause can only be interpreted as governing the family of subjects addressed in the Act itself. There is no implied preemption because the APCIA poses no conflict with the FMIA, and does not usurp the field occupied by the federal statute. The APCIA and FMIA regulate wholly separate actors and types of information. Thus, the APCIA is not preempted by the FMIA.

Second, the New York APCIA does not violate the Commerce Clause. The APCIA and the "Informed Choice" website do not discriminate against out-of-state meat producers. The benefits that they provide to important local public interests far outweigh any hypothetical

burden placed on interstate commerce. Furthermore, even if the APCIA and website were discriminatory, the public interests they serve could not be achieved through any method that places a lower burden on interstate commerce. Even if these facts are ignored, inclusion of information about New York farms on the website is not subject to dormant Commerce Clause review anyway because the website is a state spending program through which New York is a market participant. At a minimum, these facts demonstrate that material issues of fact remain and that the district court's grant of summary judgment for the appellees was improper.

e. Arguments

1. The Standard of Review

The New York State Department of Agriculture and Markets appeals a summary judgment motion granted by the trial court, and the standard of review is therefore *de novo.* Huppe v. WPCS Int'l Inc., 670 F.3d 214, 217 (2d Cir. 2012); Pilgrim v. Luther, 571 F.3d 201, 204 (2d Cir.2009). Summary judgment is appropriate only when the movant can show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is a genuine factual dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In reviewing a motion granting summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor." Id. at 255.

Because material issues of fact exist regarding the nature of the "Informed Choice" website, the extent of the burden it places on interstate commerce, and how any such burden compares to the APCIA's benefit to legitimate local public interests, Appellant contends that the grant of summary judgment was improper.

2. The APCIA is Not Preempted by the FMIA
A. The APCIA's Signs are Not "Labeling" Under the FMIA

The Federal Meat Inspection Act ("FMIA") contains a preemption provision, § 678, which prohibits states from imposing "marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter…with respect to articles prepared at any establishment under inspection." Appellees contend that this provision dictates that the Animal Products Consumer Information Act ("APCIA"), N.Y. Agric. & Mkts. Law § 1000, is preempted by the FMIA. There is no question of preemption, however, if the placards required under the APCIA do not constitute "labeling" for purposes of the FMIA. As we will demonstrate, the text of the FMIA, the U.S. Department of Agriculture's ("USDA") enacting regulations, the legislative history and purpose of the FMIA, and common sense indicate that these signs do not constitute "labeling" under the FMIA. As such, New York is free to require signage like that designated in the APCIA.

The FMIA defines "label" as "a display of written, printed, or graphic matter upon the immediate container (not including package liners) of any article." 21 U.S.C. § 601(o). It further specifies, the term "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). In the section on Labeling, Marking Devices, and Containers of the USDA's enacting regulations for the FMIA, the agency provides: "When, in an official establishment, any inspected and passed product is placed in any receptacle or covering constituting an immediate container, there shall be affixed to such container a label as described in § 317.2," which provides that "A label within the meaning of this part shall mean a display of any printing, lithographing, embossing, stickers, seals, or other written, printed, or

graphic material upon the immediate container (not including package liners) of any product." 9 C.F.R. § 317.1(a)-2(a). The section further describes the precise requirements for labels affixed to meat and meat products, including information that must be contained on the "principal display panel." Id. The regulations make clear that the FMIA is most concerned with policing the content of labeling on individual cuts of meat and food products containing meat.[4]

The common understanding of a label suggests an identifying or descriptive tag or mark. The term "labeling" must be construed according to the "subject, the context, (and) the intention" of the authors of the statute. Am. Meat Inst. v. Ball, 424 F. Supp. 758, 763 (W.D. Mich. 1976), quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). As the court said in Ball, "'Label' ordinarily connotes identifying, descriptive or promotional matter affixed to or physically on the item being 'labeled.'" Ball, 424 F. Supp. at 763. As described in § 601(o) and (p)(1), labels and labeling are affixed to the particular product. Appellee argues that the New York law's signage is "labeling" under part two of the definition—that it is "written, printed, or graphic matter" "accompanying" an article. 21 U.S.C. § 601(p)(2). The central question, then, is what Congress meant by "accompanying."

As Ball notes, in the FMIA Congress adopted verbatim the definition of labeling from the Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(m) ("FDCA"). As, before Ball, there were no cases interpreting the phrase "accompanying" in the labeling definition of the FMIA, courts have looked for guidance to cases interpreting the origin of the labeling definition in the FDCA. Ball, 424 F. Supp. at 762; *see also* Am. Meat Inst. v. Leeman, 180 Cal. App. 4th 728, 761 (2009); Kordel v. United States, 335 U.S. 345, 349-50 (1948).

[4] For example, § 317.2 spells out the specific elements each label must include, and §§ 317.13-317.62 govern the requirements for specific nutrient content claims such as "good source," "high," "more," "light," and for fat and cholesterol content.

In United States v. Rakos, the court examined the context in which Congress adopted the "accompanying" term in the FDCA's definition of labeling. United States v. Seven Jugs, Etc. of Dr. Salsbury's Rakos, 53 F. Supp. 746 (D. Minn. 1944). The court traced the labeling provisions to the original 1906 Food and Drug Act, in which the idea of "misbranding" was limited to the label or brand appearing on the article or package. By 1938, however, it had become clear that this concept of misbranding was too narrow, and that a drug manufacturer needed only separate the printed matter from the article itself in order to avoid the FDCA's jurisdiction. This lead to the overhaul of the FDCA, with the goal of further protecting consumers from fraud and mislabeled drugs by eliminating such loopholes. Cong. Rec. 73rd Cong., 2nd session, Vol. 78, Part 5, pp. 4567-4573. Thus, the Rakos court noted, given that "Congress was attempting to expand the protection given consumers in redefining the concept of misbranding, it is evident that *the word 'accompany' should be given an interpretation which accords with the Congressional purpose*." Rakos, 53 F. Supp. at 752-53 (emphasis added).

Similarly, in Kordel, the Supreme Court addressed the question of whether literature mailed in a separate envelope preceding or following that in which the drug described was sent could be considering "labeling" "accompanying" the drugs. The Kordel Court found that it could. Kordel, 335 U.S. at 349. Ruling otherwise, the Court said, would create an "obviously wide loophole" for unscrupulous drug manufacturers seeking to peddle erroneous information to consumers, defeating "(t)he high purpose of the Act to protect consumers who under present conditions are largely unable to protect themselves in this field." Id. Interpreting the "accompanying" phrase in a companion case, the Court noted, "(t)he problem is a practical one of consumer protection, not dialectics." United States v. Urbeteit, 335 U.S. 355 (1948). These cases make clear that courts' interpretation of the word "accompanying" in the definition of

"labeling" is inextricably linked to the central purpose of the FDCA—to protect defenseless consumers from fraudulent and misbranded drugs. The interpretation cannot be isolated from this purpose, and extrapolated to an inapposite scenario concerning the FMIA.

In Ball, a Michigan district court held that signage similar to that mandated by the APCIA did not constitute labeling under the FMIA, and thus the FMIA's preemption clause did not apply. Am. Meat Inst. v. Ball, 424 F. Supp. at 766. The Michigan law required grocers and restauranteurs who sold meat and meat products whose ingredients did not meet the state's standards to alert consumers by posting a red-on-yellow notice of a prescribed size, stating: "The following products do not meet Michigan's high meat ingredient standards but do meet the lower federal standards."[5] This placard must be "clearly visible to a consumer," and may be printed on a menu in restaurants. After reviewing the history of "accompanying" described in Rakos, Kordel, and Urbeteit, the court found that the signage required by the Michigan law was not meant to be encompassed by the FMIA's definition of "labeling." The court noted, "Nothing in these cases indicates the slightest intent to prohibit a state from communicating information to its citizen-consumers in order to assist them in making informed purchasing decisions. In fact, the clear thrust of the legislation is in the opposite direction." Ball, 424 F. Supp. at 766.

If the signage at issue in Ball was not found to be labeling accompanying meat products, surely the placards mandated by the APCIA cannot be considering labeling. Aside from the content of the messages conveyed, the signage requirements in the statutes are identical. As in Ball, here, no statutory or public interest purpose suggests viewing the signage mandated by the APCIA as "labeling" "accompanying" meat in the way that there were strong statutory and

[5] Notably, the court conceded that, if the signs were classified as "labeling" under the FMIA, Michigan's statute would undoubtedly be preempted by § 678. Ball, 424 F. Supp. at 761-62. While we maintain that the APCIA's placards are not "labeling," the same cannot be said of the APCIA. As we will show, the relationship between the content of the Michigan signs and the FMIA differs in crucial respects from the relationship between the content of the APCIA signs and the FMIA.

public interest purposes in viewing fraudulent mailers referring to previously-sent drugs as "labeling" "accompanying" those drugs. Moreover, in this case, unlike Ball, the information on the retail and restaurant placards is not covered or even contemplated by the FMIA. The signs in Ball concerned ingredient standards for meat products—a subject addressed in great depth in the FMIA. Here, the signs convey a "Public Interest Warning" regarding the wisdom of consuming animal products generally, because of their effects on human health, the environment, and animal welfare. This information is not within the purview of the FMIA, making it even less likely that Congress intended such signs to qualify as meat labeling governed by the Act.

In AMI v. Leeman, however, the court took the opposite view. Am. Meat Inst. v. Leeman, 180 Cal. App. 4th 728, 756 (2009). At issue was California's Prop 65 as it pertained to meat. Prop 65 requires that, when chemicals known to the state of California to cause cancer, birth defects, or other reproductive harm are present in food or other consumer products, the state must warn consumers in a manner that is "reasonably calculated…to make the warning message available to the individual prior to exposure." Cal. Code Regs. tit. 27, § 25601. This may include warnings appearing on a product's label, on shelf labeling, signs, menus, or a combination thereof, or through a system of signs or public advertising. The warnings must be displayed "with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use." Id. Leeman found, when applied to meat products, California's Prop 65 point-of-sale warnings were "labeling" "accompanying" the product. Leeman, 180 Cal. App. 4th at 756. Leeman relies heavily on language in Kordel in making this argument:

> One 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. No physical attachment one to the other is necessary. It is the *textual relationship* that is significant. Kordel v. United States, 335 U.S. at 350 (emphasis added).

Under this description, the Leeman court says, the Prop 65 point-of-sale warnings share a "textual relationship" with the meat product and thus must be labeling. Leeman, 180 Cal. App. 4th at 756-57. And because Congress adopted the same labeling definition in the FMIA as in the FDCA, the court concludes that it must have been Congress' intention to apply the definition of "labeling" from the FDCA, as interpreted by Kordel, to the term "labeling" used in the FMIA's preemption provision. Id. at 761.

Leeman takes Kordel a step too far, mischaracterizing the history of "accompanying" in the FDCA that is central to Kordel's reasoning. Leeman fails to quote the Court's discussion immediately preceding the "textual relationship" point, presumably because this would show that that phrase cannot be read in a vacuum. Leeman extrapolates from Kordel's factual scenario to find that information bearing any explanatory or supplementary textual relationship to a meat product must be "labeling" for purposes of the FMIA, regardless of the speaker, the content, the purpose, or the manner of transmission. In Kordel, the Court was grappling with the specific question of whether false or fraudulent information about a drug transmitted to a consumer in a separate envelope from the drug constituted "labeling." The court's reading of the word "labeling" and "accompanying" is inseparable from this context.

There is no doubt that Congress intended to regulate statements on product labeling and packaging made by meat producers and distributors, and to control the field of information regarding the nutritional and physical properties of meat. However, we cannot assume that Congress intended to preclude a state from disseminating general public interest- and public health-oriented information to its citizen-consumers merely because that information concerned

animal products, a subject also regulated by the FMIA. Common sense and public policy dictate the opposite. The signs prescribed by the APCIA are closer to a public service announcement than a label affixed to a particular cut of meat. They would be equally effective posted at the cash register or on the door of the store. The intent is to transmit the information to the consumer who may be buying animal products. The intent is not to inform the consumer about the physical and nutritional properties of particular cuts or meat or food products containing meat, which is the clear realm of the FMIA. In a grocery store, for example, the notice might be posted between the dairy products and the meat, visible to purchasers of both, but clearly not intended to reference any particular product. How, then, could it qualify as meat "labeling" under the FMIA? Given the state's noble public interest goals in seeking to inform consumers of the grave environmental effects, health dangers, and consequences to animal welfare of eating meat, the NMA should not be able to stifle this important dialogue between New York and its citizen-consumers by attempting to call this communication meat "labeling."

B. Even if the APCIA's Signs Could be Considered "Labeling" under the FMIA, the New York law Would Not be Preempted by the FMIA

i. Federal Preemption and the FMIA's Preemption Clause

We maintain that the APCIA signs are not meat labeling. However, even if a court were to find they did qualify as "labeling" under the FMIA, there is still ample reason to hold that the APCIA is not preempted by the FMIA. The doctrine of federal preemption arises from Article VI of the Constitution, which states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2 (the Supremacy Clause). Because "the States are independent sovereigns in our federal system," courts will not lightly presume

preemption of state law. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). In "areas of traditional state regulation," in particular, there is a presumption against preemption "unless Congress has made such an intention 'clear and manifest.'" Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 449 (2005) (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)). As the Supreme Court articulated in Gade v. Nat'l Solid Wastes Mgmt.,

> Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (internal quotation marks and citations omitted).

In questions of both expressed and implied preemption, the court's "sole task is to ascertain the intent of Congress." Cal. Fed. Sav. & Loan v. Guerra, 479 U.S. 272, 280 (1987).

Again, the FMIA's preemption clause, § 678, states, in part:

> 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…This chapter shall not preclude any State or Territory or the District of Columbia from making requirement[s] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter. 21 U.S.C. § 678.

ii. The APCIA is Not Expressly Preempted by the FMIA

Appellees contend that any information found to be "labeling" that is "in addition to or different than" the labeling described in the FMIA is necessarily preempted. 21 U.S.C. § 678.

This is not the end of the story, however. A court must decide the precise domain expressly preempted by interpreting a preemption provision—looking to its scope and effect. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517-518 (1992). Express preemption clauses must be interpreted narrowly. Matters beyond the exact reach of the clause are impliedly *not* preempted. Id. Finally, "[a]ny understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of congressional purpose.'" Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996), quoting Cipollone, 505 U.S. at 530. This purpose can be discerned in part from the statutory framework surrounding the preemption provision. Medtronic, 518 U.S. at 486.

The purpose of the FMIA, as stated by Congress, is to ensure that meat and meat products distributed to consumers are "wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602. To this end, the Food Safety and Inspection Service (FSIS) polices the labeling of meat and food products containing meat, so as to ensure that each product meets the precise requirements for weight, nutritional qualities, ingredients, and other physical properties required by the FMIA. The goal of the APCIA, by contrast, is to educate New Yorkers "by providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively impacts health, the environment, and imposes unnecessary suffering on animals." N.Y. Agric. & Mkts. Law § 1000.3. To this end, the APCIA provides a uniform message to consumers on the wisdom and effects of eating meat, via a static placard visible wherever animal products are sold. Even if these both are to be considered "labeling," it is clear from the disparate goals, speakers, context, and content of each label that they have nothing to do with one another.

In Empacadora de Carnes de Fresnillo v. Curry, the Fifth Circuit addressed the question of whether a Texas law banning horse slaughter in the state was expressly preempted by another

provision in § 678: laws "with respect to premises, facilities and operations of any establishment at which inspection is provided ... which are in addition to, or different than those made under this chapter may not be imposed by any State." 21 U.S.C. § 678; Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry, 476 F.3d 326 (5th Cir. 2007), *cert. denied*, 550 U.S. 957 (2007). The FMIA definitions section lists as a "meat food product" the food products of equines—as "any product capable of use as human food." 21 U.S.C. § 601. The FMIA of course contains detailed requirements for every aspect of slaughter and processing, and expressly preempts any state regulations of slaughterhouse "premises, facilities and operations." If horsemeat is a potential "meat food product" and meat food products originate in slaughterhouses inspected under the FMIA, the slaughterhouses alleged, the preemption clause must prohibit Texas from taking action as to slaughterhouses that slaughter and process horses. The Fifth Circuit disagreed, and described the scope of § 678:

> This preemption clause expressly limits states in their ability to govern meat inspection and labeling requirements. It in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place. We cannot read this as expressly preempting Texas's prohibition on horsemeat for human consumption….The FMIA's preemption clause is more naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use, matters Chapter 149 is entirely unconcerned with. Empacadora, 476 F.3d at 333.

The APCIA situation here is analogous. Just as the Empacadora court found that § 678 expressly limits states' ability to govern meat inspection, but in no way curtails their ability to regulate what types of meat may be sold for human consumption, here, that clause expressly limits states' ability to govern meat labeling, but in no way intrudes on their ability to communicate with citizen-consumers via placards about the environmental, health, and animal welfare impacts of animal agriculture and animal products. As in Empacadora, here, § 678

cannot be read literally or in a vacuum, but only in the context of the larger Act it prescribes. As the Seventh Circuit said in a similar horse slaughter ban case, "Of course in a literal sense a state law that shuts down any 'premises, facilities and operations of any establishment at which inspection is provided' is 'different' from the federal requirements for such premises, but so literal a reading is untenable." Cavel Int'l, Inc. v. Madigan, 500 F.3d 551, 554 (7th Cir. 2007). Just as the FMIA does not require horse slaughter simply by having a preemption clause concerning slaughterhouses, neither does it monopolize all information about meat simply by virtue of a preemption clause concerning labeling. As the district court said in this case, the FMIA's preemption clause is "more naturally interpreted" as regulating "quality of the product and the information provided by the producers and distributors"—information APCIA is unconcerned and not in conflict with. Nat'l Meat Producers Ass'n v. N.Y. State Dep't of Agric. and Mkts., No. CV 11-55440 NCA (ABCx) at *14 (S.D. N.Y. Sept. 15, 2012).

The Supreme Court's recent exploration of § 678 in NMA v. Harris does not change the above conclusion. At issue in that case was a California Penal Code § 599f, a law prescribing the treatment of non-ambulatory or "downed" sows (specifically, mandating their immediate removal from the slaughter process and humane euthanasia). The Court first states that § 678 "sweeps widely," preventing states from enacting "any additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations." Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 970 (2012). However, the Court's analysis has more to do with the incompatibility of the two statutes—conflict preemption—than with the supposedly broad scope of § 678. As the Court explains, "At every turn § 599f imposes additional or different requirements on swine slaughterhouses: It compels them to deal with nonambulatory pigs on their premises in ways that the federal Act and

regulations do not." Id. California's law fell not because of the overwhelming breadth of § 678, but because it created different, incompatible a standard for the treatment of non-ambulatory pigs—a subject addressed in detail in the FMIA.

Notably, the Court in Harris distinguished the case at bar from the Circuit decisions on horse slaughter bans. Such bans work "at a remove from the sites and activities that the FMIA most directly govern," the Court said, because they effectively mean that "no horses will be delivered to, inspected at, or handled by a slaughterhouse, because no horses will be ordered for purchase in the first instance." Id. at 974. The APCIA also works at a distance from the activities directly governed by the FMIA, requiring placards offering information of a different nature and purpose than that governed by the meat product labeling prescribed by the FMIA.

When read within the context of the FMIA and in light of these cases, therefore, § 678 does not expressly preempt the signage mandated by the APCIA, even if those signs are technically considered "labeling" under the Act. As the district court held, "[t]he FMIA does not expressly prevent the states from providing their citizens with information on the effects wholesome, not adulterated, and properly labeled animal products have on their health, the environment, or animal welfare." Nat'l Meat Producers Ass'n v. N.Y. State Dep't of Agric. and Mkts., No. CV 11-55440 NCA (ABCx) at *14-15 (S.D. N.Y. Sept. 15, 2012).

iii. The APCIA is Not Impliedly Preempted by the FMIA

The APCIA also is not impliedly preempted by the FMIA. Again, implied preemption occurs when a federal statute's scope indicates that Congress intended it to occupy the entire field ("field preemption") or when state and federal laws are in actual conflict ("conflict preemption"). Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995). Courts have found conflict preemption when it is physically "impossible for a private party to comply with both

state and federal requirements," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." English v. General Electric Co., 496 U.S. 72, 79 (1990); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

We will address conflict preemption first as it is the more obvious argument. There is no conflict between the FMIA and the APCIA. Unlike a case such as NMA v. Harris, in which it would have been physically impossible for FSIS Inspectors to comply with both § 599f and the FMIA with respect to downed pigs arriving at slaughterhouses, here, there is no question that the APCIA and FMIA govern separate actors and independent types of information. It is quite possible to comply with the full labeling requirements of the FMIA and to meet the placard posting requirement of APCIA, as the former is performed primarily by meat producers and sellers, and latter, by retail sellers and restaurants.

Neither does the APCIA "stand as an obstacle" to the accomplishment of the FMIA. It does nothing to inhibit the goal of assuring that meat available to consumers is "wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602. If anything, the APCIA complements the FMIA by ensuring that consumers possess information regarding not only the nutritional and physical properties of meat, but also the environmental, public health, and animal welfare consequences of meat consumption.

In PCRM v. McDonald's, the California Court of Appeal for the Second District reviewed the lower court's grant of summary judgment on the issue of preemption. Physicians Comm. For Responsible Med. v. McDonald's Corp., 187 Cal. App. 4th 554, 568 (2010). The case was nearly identical to AMI v. Leeman, concerning the application of California's Prop 65 "cancer-causing chemicals" warnings to meat products (in this case, grilled chicken). The statute deemed to preempt Prop 65 in this case was the Poultry Products Inspection Act (PPIA), which

contains similar labeling and preemption clauses as the FMIA.[6] At issue was the validity of the Prop 65 "Safe Harbor Warning" as applied to the restaurant's grilled chicken, which PCRM alleged contained cancer-causing chemicals.[7] The court explained,

> Even accepting all the Restaurants' arguments about the PPIA—that federal policies encourage the thorough cooking of chicken; that the statute's misbranding provision applies to grilled chicken sold in the Restaurants; and that the Proposition 65 warnings constitute "labeling under the federal statute"—we do not agree that the language of the Safe Harbor Warning creates any conflict between federal policy under the PPIA and Proposition 65. *The Safe Harbor Warning does not even mention chicken.* The Safe Harbor Warning therefore does not communicate any message about chicken of any description, whether well cooked, thoroughly cooked, or grilled. Id. at 569.

Similarly, in this case, even accepting Appellee's argument that the APCIA signs are "labeling" under the federal statute, their message creates no conflict between federal policy under the FMIA and the APCIA. Just as the Prop 65 warnings do not even mention chicken and thus could not communicate any specific message about chicken, the APCIA warning placards do not even mention meat, but only "animal products." They communicate nothing about particular types of meat or food products containing meat, aside from a general message of restraint and the suggestion of research into the products' environmental and health effects. As there is no conflict between the two statutes, there can be no conflict preemption.

Appellees would contend that while there may not be conflict between the statutes, the APCIA is still impliedly preempted because the FMIA occupies the field of meat labeling in totality, leaving no room for the APCIA. This overestimates the scope of the FMIA and its

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[6] Notably, however, this "express preemption clause does not apply to the Restaurants, as the PPIA exempts restaurants from its inspection requirements." PCRM, 187 Cal. App. 4th at 566; citing 21 U.S.C. § 454(c)(2). Thus, the only issue is whether the Prop 65 requirement is impliedly preempted by the PPIA. In all other respects the two Acts are very similar.

[7] The Safe Harbor Warning states: "WARNING: Chemicals known to the State of California to cause cancer, or birth defects or other reproductive harm may be present in foods or beverages sold or served here." Cal. Code Regs. tit. 27, § 25603.3

labeling provisions. The title and chapters of the FMIA suggest that the Act's occupation of the field encompasses, with regard to labeling, the type of information and family of subjects touched upon in the Act itself. Any different or additional label requirement as to assessing ingredients, weight, nutritional content, water content, geographic origin, producer/manufacturer, etc. is necessarily preempted, because the FMIA goes into depth in its requirements for each of these areas. Thus, state laws prescribing a different manner of labeling "imitation" cheese, 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), a different standard for labeling packaged bacon by weight, Jones v. Rath Packing Co., 430 U.S. 519 (1977), and a "failure to allow for 'reasonable variation' in the weight of food packages in relation to the net weight statement on the label," Kraft Foods N. Am., Inc. v. Rockland County Dept. of Weights & Measures, 2003 WL 554796 (S.D. N.Y. Feb. 26, 2003), all ran afoul of the FMIA because they intruded on the field occupied by the FMIA. The FMIA undoubtedly preempts state legislation in this field. It does not, however, preempt the entire realm of data regarding animal agriculture.

The public policy behind the FMIA's requirement of consistent meat labeling also dictates this conclusion. As the Empacadora court says, "The need for uniform meat packaging, inspection and labeling regulations is strong, lest meat providers be forced to master various separate operating techniques to abide by conflicting state laws." But there is no similar need for uniformity as to the types of meat states may sell. Empacadora, 476 F.3d at 334. Similarly, it is clear why states cannot enact their own nutrition labels or manners of assessing the weight of meat. This would result in a splintered and confusing labeling field—exactly what § 678 intended to prevent. However, there is no similar need for uniformity as to the message states give their citizens on the social impacts of eating animal products, generally. The APCIA's

dissemination of this message imposes no additional requirement or burden on meat providers, who are unaffected by it. As the Act governs different actors and spheres of information than those governed by the FMIA, there is no field preemption, and thus no implied preemption.

3. The APCIA Complies With the Dormant Commerce Clause

The APCIA does not discriminate against non-New York meat producers, does not create an unreasonable burden on interstate commerce, provides clear benefits to important local public interests that outweigh any such alleged burden, and, accordingly, wholly complies with the requirements of the dormant Commerce Clause.

The Commerce Clause grants Congress the power to "regulate Commerce among the several States." U.S. Const. art. I, §8, cl. 3. Courts have long interpreted this power to contain a negative corollary that prohibits states from enacting legislation that places an unreasonable burden on interstate commerce. Gibbons v. Ogden, 22 U.S. 1 (1824). Contemporary courts use a balancing test to determine if state legislation is in violation of the dormant Commerce Clause, and this balancing test is well-articulated in Pike v. Bruce Church, Inc.:

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. 137, 142 (1970).

Accordingly, a nondiscriminatory statute will be upheld even if a burden on interstate commerce exists as long as the legitimate local benefits served by the statute outweigh any such burden. The APCIA is a clear example of nondiscriminatory state legislation creating important local benefits that outweigh any incidental burden on interstate commerce.

A. The APCIA is Not Discriminatory

The first inquiry in the Pike balancing test is whether the statute in question "regulates even-handedly." Id. Courts have found that state legislation can fail this first requirement by

being discriminatory facially, *e.g.*, Hughes v. Oklahoma, 441 U.S. 322 (1979), or by possessing discriminatory intent or causing effects *e.g.*, Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977). The APCIA is not discriminatory in any of these manners.

i. The APCIA is Facially Neutral

The requirements of the APCIA apply equally to all retailers whether the animal products being sold were produced in New York or anywhere else. N.Y. Agric. & Mkts. Law § 1000.2. The district court's opinion states this fact clearly: "The New York law does not itself run afoul of the dormant Commerce Clause. It treats both intrastate and interstate animal products equally." Nat'l Meat Producers Ass'n v. N.Y. State Dep't of Agric. and Mkts., No. CV 11-55440 NCA (ABCx) at *18 (S.D. N.Y. Sept. 15, 2012). Indeed, the requirements of the APCIA are readily distinguishable from the requirements of statutes found to be facially discriminatory. *See, e.g.*, Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (an Ohio law allowing a longer tolling period for the statute of limitations for suits against non-residents than for suits against residents was found unconstitutional) and Granholm v. Heald, 544 U.S. 460 (2005) (a Michigan law allowing shipping of alcohol by in-state wineries but not out-of-state wineries was found unconstitutional). Accordingly, it is clear that the APCIA is facially neutral.

ii. The APCIA Lacks Discriminatory Intent

The APCIA was not enacted for protectionist purposes or with discriminatory intent. The primary purpose of the dormant Commerce Clause is to prevent states from enacting protectionist legislation. H.P. Hood & Sons v. DuMond, 336 U.S. 525, 533 (1949). Thus, state legislation that is shown to have a purpose of discriminating against out-of-state producers is more likely to be found unconstitutional. There is no evidence in the factual record that the APCIA was enacted for any sort of protectionist purpose or with the intent of discriminating

against out-of-state meat producers. By contrast, the APCIA was enacted with the intent of promoting public health, protecting the environment, and reducing animal suffering. The APCIA therefore "regulates even-handedly" in terms of discriminatory intent.

iii. The APCIA Causes No Discriminatory Impact

The APCIA does not create a discriminatory impact on out-of-state meat producers because it does not prohibit the flow of interstate animal products, place added costs upon the producers of such products, or distinguish between in-state and out-of-state animal product producers in the retail market. Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

In Exxon Corp., the state of Maryland passed a statute prohibiting companies that produced or refined oil products from operating retail gas stations within the state. Exxon Corp. v. Governor of Maryland, 437 U.S. at 118. Most of the companies that fit into the category of companies prohibited from operating gas stations were out of state companies. Id. at 138. In fact, of the gas stations owned by companies that did not produce or refine oil, 99 percent were operated by in-state companies. Id. By contrast 98 percent of the gas stations owned by companies that did produce or refine oil were owned by out-of-state companies. Id. Despite this incredibly negative disparate impact, The Court upheld the Maryland law:

> "[T]he Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce." Id. at 126.

In Minnesota v. Clover Leaf Creamery Co., a Minnesota law banned the sale of milk in plastic containers while permitting the sale of milk in paper containers. Minnesota v. Clover Leaf Creamery Co., 449 U.S. at 452. At the time, Minnesota had a very small plastic industry

and a large paper products industry. Id. at 460. In addition, the trial court found that the statute was partially motivated by a desire to aid the state's paper products industry at the expense of the plastics industry. Id. The Supreme Court held that despite the negative impact on out-of-state industries to the benefit of in-state industries, the Minnesota statute was constitutional because it did not implement "simple protectionism." Id. at 471.

The alleged discriminatory impact of the APCIA is that the statute references a state-run website containing information about animal products that includes a list of humane and environmentally friendly farms from New York but no such farms from other states. This claim of discriminatory impact is far more tenuous than the claims rejected by the Supreme Court in Exxon Corp. and Clover Leaf Creamery. The statutes in question in both of those cases directly created substantial benefits to in-state businesses at the expense of out-of-state businesses without creating a discriminatory effect under the dormant Commerce Clause. The alleged negative impact of the APCIA on out-of-state businesses has yet to be demonstrated, but even the hypothetical impact is indirect and likely of a much smaller magnitude than the effects seen in Exxon Corp. and Clover Leaf Creamery. Additionally, any potential impact of the APCIA on out-of-state companies would not be implemented in a way that is discriminatory under the dormant Commerce Clause. As articulated clearly in the holding of Exxon Corp., disparate impacts on out-of-state businesses are not discriminatory if they do not remove interstate products from the marketplace, place additional costs on out-of-state goods, or distinguish between in-state and out-of-state goods in the retail marketplace. The APCIA does not prohibit the flow of any interstate goods; the APCIA does not place any additional costs on out-of-state producers; and the APCIA does not distinguish between in-state and out-of-state goods in the retail marketplace. The "Informed Choice" website merely serves as a tool to provide

information to consumers and the information about New York farms that the website contains is not presented or located anywhere near the retail point of sale of animal products.

Because the APCIA does not create a disparate impact on out-of-state businesses in a discriminatory way, the statute is evaluated under the balancing test articulated in Pike.

B. The APCIA Serves Important Local Public Interests and these Benefits Outweigh Any Incidental Burden on Interstate Commerce

As stated above, Pike lays out a balancing test to be used when a state statute is nondiscriminatory and "regulates even-handedly." Pike v. Bruce Church, Inc., 397 U.S. at 402. This aspect of the test weighs the benefits of the statute to legitimate local public interests against the burden placed on interstate commerce. Id. If the benefits to local public interests outweigh the burden placed on interstate commerce, the statute will be upheld as constitutional. Id. The APCIA is constitutional because the benefits it provides to legitimate local public interests far outweigh any potential burden placed on interstate commerce.

i. Improving Public Health, Reducing Environmental Impacts, and Preventing Animal Cruelty Are All Legitimate Local Public Interests

The stated goal of the APCIA is 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. As stated in the district court opinion, these are all legitimate local public interests. Nat'l Meat Producers Ass'n v. N.Y. State Dep't of Agric. and Mkts., No. CV 11-55440 NCA (ABCx) at *19 (S.D. N.Y. Sept. 15, 2012). There is no question that the APCIA's goal of increasing consumer information in order to promote public health, protect the environment, and prevent animal suffering benefits legitimate local public interests.

ii. Promoting State Agricultural Enterprises is an Important Local Public Interest

In addition to benefitting the stated legitimate local public interests discussed above, the listing of humane and eco-friendly New York farms on APCIA's "Informed Choice" website also serves to benefit the legitimate local public interest of promoting the state's own agricultural enterprises. States have created promotional campaigns for agricultural products made within the state since 1980.[8] These promotional programs, like the allegedly offending portion of the "Informed Choice" website, serve to create awareness of and directly promote agricultural products made within a given state's borders. These campaigns are currently run by all fifty states and have never been successfully challenged as a violation of the dormant Commerce Clause.[9] Promoting excellent New York farms is a legitimate local public interest that is directly benefited by the "Informed Choice" website referred to by the APCIA.

iii. Any Potential Burden on Interstate Commerce is Minor and Outweighed by the Benefits to the Important Local Public Interests

Having established that the APCIA and the "Informed Choice" website benefit a multitude of legitimate local public interests, the final step of the Pike analysis is to weigh these benefits against any potential burdens that the statute places on interstate commerce. The benefits to public health, the environment, reduction in animal suffering, and promotion of New York agriculture are all clearly documented by the evidentiary record. Consumption of animal products is a major contributor to diabetes, heart disease, and premature death.[10] Production of animal products is a major contributor to greenhouse gas emissions and climate change.[11]

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[8] Kathryn A. Onken and John C. Bernard, Catching the "Local" Bug: A Look at State Agricultural Marketing Programs, Choices (1Q 2010), http://www.choicesmagazine.org/magazine/pdf/article_112.pdf
[9] Id.
[10] Physicians Committee for Responsible Medicine, supra.
[11] Food and Agriculture Organization of the U.N., supra.

Animals themselves suffer tremendously due to a wide variety of common farming practices.[12] These are all facts to which the APCIA and the "Informed Choice" website bring attention. By bringing attention to these facts and directing consumers to the "Informed Choice" website, the APCIA is able to increase the level of information available to consumers and empowers consumers to make healthier, more eco-friendly, and more ethical choices about the food products they elect to consume. The inclusion of information about New York farms that use humane and environmentally friendly practices is an essential part of empowering consumers to take action on the information about how their dietary choices affect their own health as well as the world around them. The APCIA's benefits to legitimate local public interests are clear.

The alleged burden on interstate commerce appears quite small in comparison to the local benefits described above. Any burden on interstate commerce relies on individual consumers making a chain of inferences that may or may not ever aggregate into a burden on interstate commerce at all. A consumer that would have otherwise bought an out-of-state animal product, must first not buy that product because of the APCIA placard, visit the "Informed Choice" website referenced in the placard, navigate on the "Informed Choice" website to the page containing information about New York farms, and then decide that he or she will purchase an animal product after all, but one from a listed New York farm instead of an out-of-state farm. Appellee has presented no evidence that such an event has occurred or is likely to occur on a scale that would place a burden on interstate commerce of a size remotely large enough to substantially outweigh the benefits to legitimate local public interests served by the APCIA.

Given the fact-intensive nature of the Pike balancing test and the evidence discussed above, it is impossible that summary judgment was properly granted for the appellee on this issue. The district court's granting of summary judgment should be reversed both because

[12] Humane Society of the United States, supra.

material issues of fact exist and because the extant record demonstrates that the APCIA creates benefits to legitimate local public interests that far outweigh the alleged burden placed on interstate commerce by the "Informed Choice" website.

C. Even if it were Discriminatory, the APCIA Complies with the Dormant Commerce Clause because it Promotes the Important Local Public Interests in a Manner That Is Least Burdensome on Interstate Commerce

While the APCIA is nondiscriminatory under Pike, it would still comply with the dormant Commerce Clause even if it were discriminatory because it promotes important local public interests in a way that places the lowest possible burden on interstate commerce. Laws that discriminate against out-of-state businesses are upheld when they serve an important local public interest and could not be implemented in an alternate nondiscriminatory method. Maine v. Taylor, 477 U.S. 131 (1986).

In Maine v. Taylor, a Maine law prohibiting the importation of live baitfish from out of state was upheld. Id. The law served the important purpose of preserving the integrity of Maine's native fish populations. Id. at 141. Shipments of baitfish from outside of the state often contained parasites or invasive species. Id. The Court held that because there was no cost-effective way of inspecting shipments of baitfish entering the state, that the Maine law was constitutional because it served an important local public interest while placing the lowest possible burden on interstate commerce. Id. at 146.

The APCIA complies with the dormant Commerce Clause even under the stricter scrutiny given to statutes deemed to be discriminatory because the important local public interests it promotes could not be effectively promoted through some other less discriminatory means. The alleged discrimination is the inclusion of New York farms but not out-of-state farms on the "Informed Choice" website. This alleged discriminatory effect is far less restrictive than the

actual facial discrimination in Maine v. Taylor. However, as in Maine v. Taylor, the inclusion of information about New York farms without including information about out-of-state farms is necessary to achieve the APCIA's important local public benefits and is the least burdensome way through which those benefits can be achieved.

The Court found protecting the integrity of local fish stocks to be an important local public benefit. Id. at 141. Surely the similar environmental concerns of the APCIA, especially when taken together with public health and animal suffering concerns, qualify as even more important local public interests. These important concerns would not be as effectively promoted if, as the district court contends, the "Informed Choice" website reduced the availability of consumer information by removing the listing of humane and environmentally-friendly New York farms from its pages. Undoubtedly, consumers would have less practical guidance about how to make healthier, more eco-friendly, and more humane choices about the animal products they choose to consume. Encouraging such informed choices is the very essence of the statute. Also, as recognized in Maine v. Taylor, a state may have legitimate reasons to treat out-of-state businesses differently apart from the fact that they are out of state. Id. at 151. The APCIA has such a legitimate reason in the fact that documentation and examination of farms from the forty-nine other states would be cost-prohibitive in light of the New York's limited resources. Just as Maine reasonably could not afford to inspect each individual baitfish shipped into the state, New York reasonably cannot afford to inspect and document the conditions and processes of each out-of-state farm that wishes to sell animal products within New York's borders. Accordingly, the inclusion of readily available information about New York farms is necessary to promote the important local public benefits served by the APCIA, and no less burdensome means exists through which these important ends could be achieved.

Another important local public benefit served by the inclusion of information about New York farms on the "Informed Choice" website is the promotion of awareness of local agricultural enterprises. Promotional campaigns for agricultural products made in-state exist in each and every state, and have been in existence for more than thirty years. This important local public interest is well-served by the "Informed Choice" website by providing consumers information about local farms that abide by standards stricter than the industry norm. In fact, it is hard to see how this interest could be served at all if the information about New York farms was not included. All cost considerations aside, it is also hard to see how this interest would be served if information about farms from other states was included as well. Such a standard would render state agricultural marketing programs useless. Fortunately, such a standard is not the law, and the "Informed Choice" website's inclusion of information about New York farms is compliant with the dormant Commerce Clause because it is absolutely necessary to provide the important public local benefit of increasing awareness of state agricultural enterprises.

D. Even if it did Not Comply with the Dormant Commerce Clause, the APCIA is Exempt from Dormant Commerce Clause Requirements under the Market Participant Exception

While the evidence establishes that the APCIA and the "Informed Choice" website do not violate the dormant Commerce Clause, even if the alleged violation was present, New York would be exempt from the dormant Commerce Clause's requirements under the Market Participant Exception because the New York farms are benefitting from a state spending program. When a state enters the marketplace as a participant through the use of a state spending program, the state is not subject to the restraints of the dormant Commerce Clause. White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983).

In White, the mayor of Boston enacted an executive order requiring that all construction products funded in whole in part by city funds must be performed by workforce of which at least fifty percent resided in the city of Boston. Id. The Supreme Court held that the executive order was not subject to the restraints of the dormant Commerce Clause because the city was spending money as a market participant instead of acting as a regulator. Id. at 215. Boston could thus elect to use its resources to benefit its citizens disproportionately. Id.

The "Informed Choice" website referenced by the APCIA is most accurately characterized as a state spending program in which New York is participating in the market of disseminating information about animal products. Other participants in this market include the appellee, numerous individual businesses, and a variety of other lobbying groups. If this was not a bona fide marketplace, these other market participants would not spend billions of dollars a year propagating their views. New York is just as much a market participant as these businesses because it is expending its own resources in an effort to educate the public about the consumption and production of animal products and in so doing is competing against myriad other market participants. Just as Boston's use of public funds to mandate local employment was not subject to the dormant Commerce Clause, New York's use of public funds to participate in the market of information about animal products is not subject to review under the dormant Commerce Clause.

f. Conclusion and Request for Relief

The APCIA is neither preempted by the FMIA nor in violation of the dormant Commerce Clause. For these reasons, Appellants respectfully request that the judgment of the district court be reversed and that the case be remanded with instructions to the district court to enter judgment in favor of the Appellants.