No. CV 11-55440NCA (ABCx)

United States Court of Appeals for the Second Circuit

NATIONAL MEAT PRODUCERS ASSOCIATION,
Appellee,

v.

COMMISSIONER, NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS AND THE NEW YORK STATE DEPARTMENT OF AGRICUTRURE AND MARKETS,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

Team #18

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STATEMENT OF THE ISSUES

I. Whether the district court erred when it held that New York State's Animal Products Consumer Information Act, N.Y. Agric. & Mkts. Law § 1000, is not preempted by the Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq*.

II. Whether the district court erred when it concluded that New York State's Animal Products Consumer Information Act, N.Y. Agric. & Mkts. Law § 1000, violates the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3.

STATEMENT OF THE CASE

Defendant-Appellants New York State Department of Agriculture and Markets and the Commissioner thereof (collectively "the Department") appeal the final order of the United States District Court for the Southern District of New York granting summary judgment in favor of Plaintiff-Appellee National Meat Producers Association ("NMPA").[1] NMPA instituted this suit seeking to enjoin New York State's Animal Products Consumer Information Act ("APCIA"), N.Y. Agric. & Mkts. Law § 1000, asserting that the APCIA violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. On NMPA's motion for summary judgment under Fed. R. Civ. Pro. 56, U.S. District Judge Nathaniel C. Alexander held that the APCIA was not preempted by the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601, *et seq*., and thus did not violate the Constitution's Supremacy Clause. But Judge Alexander agreed with the NMPA that the AIPCA unlawfully burdened interstate commerce, and thus violated the Commerce Clause of the Constitution.

[1] The New York State law seeks to regulate information accompanying the sale of all animal products including beef, pork, poultry, seafood, eggs, and dairy. The NMPA's complaint is limited to the application of the law to beef and pork products. The poultry, seafood, egg, and dairy industries have brought separate cases.

The Department filed this timely notice of appeal on September 15, 2012. The District Court had original jurisdiction under 28 U.S.C. § 1331 because this case arises under the law of the United States, 21 U.S.C. § 601, *et seq*.; U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. VI, cl. 2. The United States Court of Appeals for the Second Circuit has jurisdiction because the final decision of the district court was entered on September 15, 2012 and the appellant filed a notice of appeal on September 15, 2012. *See* 28 U.S.C. § 1291.

STATEMENT OF FACTS

New York State enacted the Animal Products Consumer Information Act ("APCIA"), N.Y. Agric. & Mkts. Law § 1000, §1000.3, in 2010 with the stated purpose of "protect[ing] 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."

Facing budget constraints, the state legislature of New York empowered a number of multi-topic congressional committees to identify ways in which the state could reduce its costs. *See Nat'l Meat Producers Ass'n v. New York State Dep't of Agric. & Mkts.*, --- F.3d ---, No. 11-55440 NCA (ABC), at *3 (S.D.N.Y. Sept. 15, 2012) ("Mem. Op."). One committee, titled The Long-Term Reduction of Government Costs Without Cutting Benefits Committee ("the Committee"), was tasked with identifying possible policy changes the legislature could make to reduce the state's long-term costs without a significant reduction in state benefits. Mem. Op. at 3. After hearing over a thousand hours of expert testimony, the Committee recommended over 500 different cost-savings measures—one of which led to passage of the statute at issue in this case. Mem. Op. at 3. The Committee recommended that the legislature "encourage the reduction of the public's consumption of animal products which would in turn reduce the long-

term health care and environmental costs to the State." Mem. Op. at 3. Citing three primary rationales,[2] the legislature enacted the APCIA. Mem. Op. at 3. A comprehensive review of the testimony the Committee heard from medical and environmental experts is available in the district court's memorandum opinion. *See* Mem. Op. at 4–11, app. B.

Section 1000.4.1 of the APCIA requires all retailers to display a sign wherever animal products intended for human consumption are offered for sale. The placard requires the display of the following text:

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

N.Y. Agric. & Mkts. Law § 1000.4.1. The entire text of the APCIA is available in Addendum A of the district court's memorandum opinion. The state-sponsored website referenced on the placard provides detailed information on the health effects of consuming animal products, the impact of animal agriculture on the environment, and animal suffering. Mem. Op. at 4. The information on the website was provided and approved by experts who testified before the Committee. Mem. Op. at 4. The website also provides a list of farms that the legislature determined were environmentally sustainable and employed humane welfare standards. Mem. Op. at 4. All of the farms listed on the website are located within New York State. Mem. Op. at 4.

[2] In addition to lowering the state's health care and environmental costs through encouraging people to eat fewer animal products, the legislature also cited the humane treatment of animals to be an additional important public interest. Mem. Op. at 3.

Following enactment of the APCIA, the National Meat Producers Association ("NMPA"), a national trade association of meat producers, brought an action for declaratory judgment and injunctive relief, asserting that the APCIA is invalid on two distinct bases: (1) the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601, *et seq*., preempts the APCIA's placard requirement, rendering the AIPCIA invalid under the Supremacy Clause, U.S. Const. art. VI, cl. 2; and (2) the APCIA discriminates against out-of-state meat processors and imposes an unreasonable burden on interstate commerce, in violation of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

SUMMARY OF ARGUMENT

The NMPA's argument that the APCIA is preempted by the FMIA is invalid for four reasons. First, the FMIA expressly preempts specific "labeling" requirements that are contrary to or different from the FMIA's requirements; the placards required under the APCIA fall categorically outside the FMIA's definition of "labeling," as revealed by a majority of cases that have interpreted the definition. Second, even if this Court decides the APCIA placards constitute "labeling" under the FMIA, the APCIA's placards address a subject matter distinct from the objectives of the FMIA; thus the placards' substantive information falls beyond the scope of the FMIA's express preemption provision. Third, the FMIA does not implicitly preempt the APCIA through field preemption, because there is no indication that Congress intended the FMIA to be the exclusive regulatory scheme concerning all meat product information. Fourth, the FMIA does not implicitly preempt the APCIA through conflict preemption, because there is no evidence that compliance with both statutes is physically impossible or that the APCIA poses an obstacle to the execution of the full purposes and objectives of the FMIA.

The NMPA's second argument, that the APCIA violates the negative component of the Commerce Clause, is similarly unpersuasive. The law is neutral on its face, requiring informational placards to be placed next to animal products wherever they are sold for human consumption. The law is also neutral in effect, encouraging the public to consume fewer animal products, regardless of their state of origin. Under the test set forth in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970), any incidental burden the statute imposes on interstate commerce is not excessive in relation to the multiple local benefits it provides. The district court erred in holding otherwise. Finally, assuming *arguendo* that the content of the website listed on the placards violates the Commerce Clause, this content can be severed and the remainder of the statute saved.

ARGUMENT

I. THIS COURT SHOULD APPLY THE *DE NOVO* STANDARD WHEN REVIEWING THE DECISION OF THE DISTRICT COURT.

An appellate court "review[s] a district court's grant of summary judgment *de novo*, viewing the facts in the light most favorable to the non-moving party." *Amador v. Andrews*, 655 F.3d 89, 94 (2d. Cir. 2011) (citing *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006)). Under the *de novo* standard of a review, an appellate court's review of the district court's conclusion "is independent and plenary," and the court "look[s] at the matter anew, as though it had come to the courts for the first time." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) (citing *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991)).

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DETERMINATION THAT THE FMIA DOES NOT PREEMPT THE APCIA.

The district court correctly concluded that the FMIA does not preempt the APCIA and thus does not violate the Supremacy Clause, U.S. Const. art. VI, cl. 2. This Court should affirm

the preemption portion of the district court's opinion for four reasons. The first two contentions address express preemption; the third and fourth contentions address implicit preemption.

First, the FMIA does not expressly preempt the APCIA's placard requirement because it does not constitute "labeling" under either the plain language of the FMIA's statutory definition or through case law that has interpreted the term. The FMIA contains an express preemption provision that states only "*labeling . . . requirements* in addition to, or different from those made under [the FMIA] may not be imposed by any State." 21 U.S.C. § 678 (emphasis added). Thus, if the APCIA's placard provision does not constitute "labeling," the FMIA's express preemption clause does not apply to the APCIA placard requirement. Alternatively, if this Court concludes the APCIA's placard provision does constitute "labeling," the APCIA still falls outside the scope of the FMIA's express preemption provision because the information required under the APCIA concerns a subject matter distinct from the information that the FMIA regulates. Third, the FMIA does not implicitly preempt the APCIA under the doctrine of field preemption. Fourth, the FMIA does not implicitly preempt the APCIA under the doctrine of conflict preemption.

The Supremacy Clause of the U.S. Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The Supremacy Clause "invalidates state laws that interfere with, or are contrary to, federal law." *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 712–13 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (Marshall, C.J.)) (internal quotation marks omitted). Supreme Court jurisprudence has established three ways Congress can supersede state law: first, "Congress is empowered to pre-empt state law by so stating in express terms," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); second, where

Congress has so thoroughly regulated an area, Congress's intention for its regulation to be exclusive is clear (field preemption); and third, where Congress makes compliance with both federal and state law impossible or state law poses an obstacle to full execution federal objectives (conflict preemption). *See generally Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (identifying the different types of federal preemption).

A. <u>The FMIA Does Not Expressly Preempt the APCIA.</u>

This Court should hold that the FMIA does not expressly preempt the APCIA for two reasons. First, the FMIA's preemption provision only applies to state "labeling" requirements. This Court should determine that the information required by the APCIA does not constitute "labeling" as it is defined by statute or interpreted under existing case law. Yet, even if this Court concludes the APCIA's placard requirement constitutes "labeling," this Court should affirm the district court's holding that the information conveyed by the APCIA placard is distinct from the information that Congress sought to regulate under the FMIA.

1. The APCIA's placard requirement does not constitute "labeling."

This Court should hold that the APCIA's placard requirement falls outside the scope of the FMIA's preemption provision because the placard does not constitute "labeling." The FMIA's preemption provision states, in relevant part, that "labeling . . . requirements in addition to, or different from those made under [the FMIA] may not be imposed by any State." 21 U.S.C. § 678. The term "labeling" is defined by the statute to mean "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).

The APCIA does not require any additional materials on the animal products themselves, or on their container or wrapper. Accordingly, section 601(p)(1) is inapplicable. Courts interpreting section 601(p)(2) have divided over the meaning of the word "accompanying."

The Supreme Court has interpreted this same definition of "labeling" under the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301, *et seq.* In *Kordel v. United States*, 335 U.S. 345, 347–52 (1948), the Court was asked to determine whether the FDCA definition of "labeling" covered sales literature that was not distributed with a drug. The Court held that the content of the materials, not their physical proximity, controlled:

> 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.

Id. at 350.

The Court held that the advertising matter at issue constituted "labeling" because it "performs the same function as it would if it were on the article or on the containers or wrappers." *Id.* at 351. The Court concluded that the sales literature constituted "labeling" because it instructed the end consumer how to use the drugs: "It explained their uses. Nowhere else was the purchaser advised how to use them. It constituted an essential supplement to the label attached to the package." *Id.* at 348.

In support on its conclusion that APCIA's placard requirement does constitute "labeling," the court below relied on *Meaunrit v. ConAgra Foods Inc.*, No. C 09–02220 CRB, 2010 WL 2867393, at *8 (N.D. Cal. July 20, 2010). *Meaunrit* concerned an in-store cardboard sign that promoted the defendant's product in an allegedly misleading way; the plaintiff argued that the FMIA did not preempt her claim because the sign constituted an advertisement—not a label. *Id.* The court relied on *Kordel* to support its interpretation of "labeling" under the FMIA:

> The *Kordel* decision, while addressing the FDCA, is still relevant in this analysis because the FIMA [sic] contains the same definition of "labeling" as the FDCA, an intentional decision by Congress to preclude states from enacting their own point-of-sale requirements. Accordingly, it cannot be said that the in-store poster Plaintiff alleges she saw was an advertisement rather than a label for purposes of federal preemption.

Id. (internal citation omitted).

The reading adopted by the court below and the court in *Meaunrit*, however, is a minority position. In *American Meat Institute v. Ball*, 424 F. Supp. 758, 764–66 (D. Mich. 1976), the court was asked to consider the same definition of "labeling" under the Federal Wholesome Meat Act,[3] and the plaintiff vigorously argued that the court should read *Kordel* as controlling precedent. *Ball* concerned a state law that required grocers and restaurants that sold meat products to notify consumers about products whose ingredients fell below state's minimum standards for similar products that were produced and sold exclusively within state. *Id.* at 759. Similar to the instant case, in *Ball*, a national trade association brought suit on preemption grounds to invalidate the state notification requirements. *Id.*

The court rejected the plaintiff's constrained reading, holding that Congress's use of the term "accompany" "shows beyond a doubt that Congress was seeking to protect consumers and to curb misleading information provided by those involved in manufacturing or selling regulated products." *Id.* at 766. None of the relevant cases the court reviewed "indicate[d] the slightest intent to prohibit a state from communicating information to its citizen-consumers in order to assist them in making informed purchasing decisions." *Id.* Indeed, the court noted, "the clear thrust of the legislation is in the opposite direction." *Id.* Accordingly, the court concluded that the definition of "labeling" under the FMIA should "be construed in a manner which is

[3] The Federal Whole Meat Act of 1967 modified and amended certain provisions of the FMIA, and is codified at 21 U.S.C. § 601, *et seq*.

consistent with the Congressional goal of protecting consumers, and that the notices required by [state] law are not 'labels' within the meaning of the [federal] statute." *Id.*

Similarly, in *Gershengorin v. Vienna Beef, Ltd.*, No. 06 C 6820, 2007 WL 2840476, at *1–*2 (N.D. Ill. Sept. 28, 2007), plaintiffs in a putative class action alleged that the defendant provided sellers with signage and advertisements stating that its products were "beef," "pure beef," and/or "all-beef," despite the fact the hot dog casings the plaintiffs purchased were actually a pork product. The plaintiffs urged the court to determine that the signage and advertisements constituted a "fraudulent misrepresentation" under the FMIA's definition of "labeling." *Id.* at *3. The court summarily rejected the plaintiffs' contention, concluding, "The FMIA does not preempt regulation of signage separate from the marking or labeling on meat packaging itself." *Id.*[4]

Furthermore, this Circuit has previously interpreted a substantially similar definition of "labeling" under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136, *et seq*. *See New York State Pesticide Coal., Inc. v. Jorling*, 874 F.3d 115 (2d Cir. 1989). In *Jorling*, the statute defined "labeling" as "all labels and all other written, printed, or graphic matter . . . *accompanying* the pesticide or device at any time." FIFRA, 7 U.S.C. § 136(p) (emphasis added). This definition is identical to the definition under the FMIA in every meaningful way—particularly inclusion of the term "accompanying." The New York state law at issue in *Jorling* required all commercial pesticide applicators to, *inter alia*, provide notification to the public of pesticide application through posting signs on the perimeters of the

[4] In support of this conclusion, the *Ball* court provided the following citations. *United States v. Stanko*, 491 F.3d 408, 418 (8th Cir. 2007) (this provision of § 678 does not preempt state unfair-trade-practices laws); *Cavel International, Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007) (FMIA inspection provision is not applied literally). *Cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443–45 (2005) (similarly worded labeling or packaging preemption provision of Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b), does not preempt fraud claim based on oral statements made by the salesperson).

affected property that instructed persons not to enter the area for a 24 hour period; and in some cases, vendors were also required notify the public in newspapers if the prospective application covered large tracts. *See Jorling*, 874 F.3d at 116–17.

The plaintiffs in *Jorling*, a coalition of pesticide applicators, argued that the state law notification requirements constituted "labeling" under FIFRA and were therefore preempted because stat law required additional "written, printed, or graphic matter" that "accompan[ies] the pesticide or device." *Id.* at 118–19. The Second Circuit rejected the plaintiff's argument, concluding that while these notification materials would be "present in some spatial and temporal proximity" to the pesticides, the materials would not "accompany" the pesticides under FIFRA. *Id.* at 119. The Court noted that "'[l]abeling' is better understood by its relationship, rather than its proximity, to the product." *Id.* Echoing the same rationale the court in *Ball*, the Second Circuit concluded that the state law notification requirements did not impair the federally-mandated label, and actually furthered the purpose of the federal law. *Id.* The Court determined that Congress's intent was "to set minimum standards for . . . labeling, not to prevent states from regulating the 'sale and use' of . . . substances through mandatory written, printed, or graphic materials." *Id.* at 119–20.

Here, this Court should adopt the majority view of the interpretation of "labeling" and follow the previous jurisprudence of this Circuit. The district court's reliance on *Meaunrit* is misplaced for several reasons. The holding of *Meaunrit* rests on an unduly narrow and cramped understanding of the *Kordel* decision that other courts have expressly rejected. The reasoning of *Meaunrit* is conclusory, asserting without support that through the FMIA, Congress has successfully precluded states from enacting any and all of their own point-of-sale requirements. Further, the *Meaunrit* court failed to appreciate the sweeping impact of its conclusion—

potentially outlawing any and all graphics, signage, advertisements, and/or notifications that state law may attempt to require at the point of sale. In addition, *Meaunrit*'s broad interpretation is directly at odds with this Circuit's decision in *Jorling*. *Meaunrit* expressly precludes states from enacting their own point-of-sale requirements, while *Jorling* expressly embraces state regulation of mandatory written, printed, or graphic materials—so long as they do not impair the federal label. Finally, the *Meaunrit* court's conclusion is further muddled by the court's apparent conflation of interpreting the term "labeling" and the doctrine of implicit field preemption, as evidenced by the court's odd assertion that the FMIA provides exclusive regulation of in-store promotions. 2010 WL 2867393, at *8. This Court should reject the unpersuasive reasoning of *Meaunrit* and the district court's reliance on it.

Further, as noted in *Ball*, courts need not read *Kordel* so narrowly. Instead, *Kordel*—read in conjunction with this Circuit's decision in *Jorling*—support the broader principle that state law can permissibly supplement federal law without falling within the "accompanying" prong of the definition of "labeling." These cases support the conclusion that state laws that do not impair or interfere with the federally mandated label should be permissible, while state laws that further a federal law's objective (while using state resources) further weigh in favor of the state law's permissibility. The record in this case reveals that the APCIA placard requirement in no way impairs any requirement of the FMIA, and furthers the FMIA's objective of protecting and informing consumers about meat products they intend to consume.

Accordingly, this Court should determine that the placard requirement at issue does not constitute "labeling" under the FMIA, and hold that the APCIA falls categorically outside the preemption provision of the FMIA.

2. Alternatively, the FMIA's express preemption provision is inapplicable to the state law because the APCIA's placard requirement concerns distinct information beyond the scope of the FMIA.

If, however, the Court is convinced that the APCIA placard requirement constitutes "labeling" under the FMIA's preemption provision, the Court need not hold that the FMIA's preemption provision applies. Instead, the Court should affirm the reasoning of the district court and conclude that substance of the information conveyed to consumers under the APCIA is distinct from the type of information the FMIA regulates. *See* Mem. Op. at 14–15.

The Supreme Court has recognized that in both cases of express and implied preemption, a reviewing court's "sole task is to ascertain the intent of Congress." *Cal. Fed. & Loan v. Guerra*, 479 U.S. 272, 689 (1987). Further, the Supreme Court has held that congressional intent must be clear in order to preempt state law because federalism disfavors invalidation of state law. *See N.Y. St. Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973). Put another way, "[t]he exercise of federal supremacy is not lightly to be presumed." *Id.* (quoting *Schwartz v. Texas*, 344 U.S. 199, 202–03 (1952)). In all preemption cases, courts are to "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Hillsborough*, 471 U.S. at 715).

The primary intent of the federal labeling requirements under the FMIA is to protect the health and welfare of consumers from fraudulent or deceptive practices by manufacturers and distributors of meat products. *See* 21 U.S.C. § 602. The APCIA, conversely, seeks to convey information to consumers regarding the effects of animal production and consumption on human health and the environment, in addition to concerns about animal suffering. *See* N.Y. Agric. & Mkts. Law § 1000.3.

While both objectives fall under the broad umbrella of protecting and informing consumers about what they eat, the statutes' specific goals are distinct. The district court recognized this distinction, stating that "[t]he FMIA's preemption clause is more naturally interpreted as regulating the quality of the product and the information provided by the producers and distributers, matters which the New York law is entirely unconcerned with." Mem. Op. at 14. Instead, the "New York law does not infringe on the territory preserved for the Federal government by the FMIA's preemption clause" because the FMIA "does not expressly prevent the states from providing their citizens with information on the effects . . . properly labeled animal products have on their health." *Id.* at 14–15. Furthermore, the FMIA is entirely unconcerned with the state's other rationales for the placard requirement, such as decreasing animal suffering, preserving the environment, and limiting the state's expenditures on healthcare and environmental preservation.

Accordingly, this Court should conclude that the federal preemption clause addresses a class of information that is wholly distinct from the information required by the state law, holding that FMIA's express preemption clause is inapplicable to the APCIA.

B. <u>The FMIA Does Not Implicitly Preempt the APCIA.</u>

This Court should further hold that the FMIA does not implicitly preempt the APCIA's placard requirement.

In the absence of express preemption language, Congress's intent to preempt all state law in a particular area "may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough*, 471 U.S. at 713 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This first type of implicit preemption is known as "field preemption."

Courts will infer field preemption "where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (quoting *Rice*, 331 U.S. at 230).

Even where Congress has not completely displaced an entire field of state regulation, "state law is nullified to the extent that it actually conflicts with federal law." *Hillsborough*, 471 U.S. at 713. This second type of implicit preemption is known as "conflict preemption." Courts will infer conflict preemption in two distinct cases—where "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

1. The FMIA does not implicitly preempt the APCIA via field preemption.

This Court should conclude that the FMIA does not implicitly preempt the APCIA under the doctrine of field preemption. Field preemption requires Congress's manifestation of a clear intention to preempt state law. *Guerra*, 479 U.S. at 280–81 (citing *Rice*, 331 U.S. at 230). Courts find field preemption where Congress has legislated in a way that "indicates that Congress intended federal law to occupy a field exclusively." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

The FMIA expressly states that Congress did not intend to preempt the entire field of meat regulation. *See* 21 U.S.C. § 678 (The FMIA "shall not preclude any State . . . from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter."). Further, the FMIA includes an express preemption clause that concerns meat inspection and labeling. *Id.*; *see also supra* at II.A. Where Congress enacts "a

provision defining the pre-emptive reach of a statute" this provision "implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

Finally, the FMIA, by its very name, expressly refers to regulation of meat *inspection*. The FMIA makes no reference to the broader regulation of all information concerning meat. Conversely, the APCIA does not concern inspection, packaging, or specific labeling of meat products; instead, the APCIA seeks only to provide consumers with additional information regarding the health and environmental impacts of animal agriculture and consumption. Accordingly, in the absence of any indication suggesting Congress intended the FMIA to occupy the entire field of meat information regulation, this Court should decline to hold that the FMIA implicitly preempts the APCIA under the doctrine of field preemption.

2. The FMIA does not implicitly preempt the APCIA via conflict preemption.

This Court should conclude that the FMIA does not implicitly preempt the APCIA under the doctrine of conflict preemption. Implicit conflict preemption requires either: (1) a federal law that makes compliance with both state and federal law "physically impossible," *Paul*, 373 U.S. at 142–43; or (2) a state law "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67.

There is no conflict between the FMIA and the APCIA. There is no evidence in the record that strict compliance with both the FMIA and the APCIA is "physically impossible." Further, there is no evidence in the record that suggests the APCIA poses any obstacle to full execution of the FMIA's stated objective of "assuring that . . . meat food products distributed to [consumers] are wholesome . . . and properly marked, labeled, and packaged." 21 U.S.C. § 602. Instead, the APCIA simply supplies the public with additional information on a subject matter distinct from the objectives of the FMIA. Accordingly, in the absence of any conflict between

the state and federal laws at issue, this Court should decline to hold that the FMIA implicitly preempts the APCIA under the doctrine of conflict preemption.

III. THE APCIA DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BECAUSE IT IS NOT DISCRIMINATORY IN PURPOSE OR EFFECT AND DOES NOT EXCESSIVELY BURDEN INTERSTATE COMMERCE.

The Commerce Clause of the United States Constitution gives Congress power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The clause includes a negative component, known as the dormant Commerce Clause, which prohibits the states from discriminating against or excessively burdening interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 98 (1994). A statute only violates the dormant Commerce Clause if it "(1) 'clearly discriminates against interstate commerce in favor of intrastate commerce,' (2) 'imposes a burden on interstate commerce incommensurate with the local benefits secured,' or (3) 'has the practical effect of 'extraterritorial' control of commerce occurring entirely outside the boundaries of the state in question.'" *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009) (citing *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir.2004)).

A. <u>The APCIA Does Not Discriminate Against Interstate Commerce Because the Statute Applies to All Animal Products Equally and Furthers Compelling State Interests That Cannot Be Adequately Advanced by Alternative Means.</u>

Discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.*, 511 U.S. at 99. A statute can discriminate on its face or in effect. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (striking down as facially discriminatory a law that prohibited taking minnows from Oklahoma waters out of the state but not regulating the intrastate use of those same minnows). An

otherwise discriminatory law may be upheld if it advances a legitimate state interest that cannot be sufficiently advanced by alternative means. *Or. Waste Sys.*, 511 U.S. at 101.

On its face, the APCIA does not treat in-state and out-of-state interests differently. The APCIA requires placards to be placed near all animal products for human consumption sold in New York State without regard to the products' state of origin. N.Y. Agric. & Mkts. Law § 1000.4. For this reason, the district court properly held that the APCIA does not facially discriminate against interstate commerce. Mem. Op. at 18.

Furthermore, the APCIA does not treat in-state and out-of-state interests differently in practical effect. As the district court suggests, the placards will likely lead to a decrease in the consumption of animal products generally among persons in New York. *Id.* The subsequent decrease in demand should impact in-state and out-of-state producers of animal products equally. *Id.* There is no evidence in the record to indicate that an overall reduction in animal product consumption by New Yorkers would impact out-of-state producers any more heavily than in-state ones.

In addition to information about animal products, the placards required by APCIA also direct consumers to a website that provides additional information about the effects of consuming such products. Though the website contains a list of sustainable and humane farms that includes only farms in New York, the NMPA has not introduced sufficient evidence to show that this list has the effect of discriminating against interstate commerce. Nothing in the record suggests that a list of sustainable and humane farms in New York has had, or will have, a negative impact on out-of-state farms while benefiting New York farms. The NMPA has failed to introduce any evidence showing that out-of-state sustainable or humane farms export any animal products to New York (if no such farms exist then there would be no out-of-state farms to

add to the existing list). Without facts to support the contention that the APCIA discriminates against interstate commerce, NMPA is not entitled to summary judgment on this point.

Even if this Court determines that the APCIA discriminates against interstate commerce, the statute advances compelling state interests that cannot be adequately advanced through alternative means. The APCIA was enacted to disseminate information to the public regarding the adverse effects of consuming animal products on human health, the environment and animal welfare. N.Y. Agric. & Mkts. Law § 1000.3. All three of these interests are compelling state interests.

First, protecting public health is one of the principle duties of state government. *See Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (quoting *Slaughter-House Cases*, 16 Wall. 36, 62 (1873))). Numerous states regulating food and food labeling in the name of human health and protection have been upheld as valid exercises of state power. *See, e.g.*, *Grocery Mfrs. of America, Inc. v. Gerace*, 755 F.2d 993, 1005 (2d Cir. 1985) (upholding state statute requiring labeling of imitation cheese against dormant Commerce Clause challenge); *Corn Prods. Ref. Co. v. Eddy*, 249 U.S. 427, 429–31 (1919) (upholding state statute requiring syrups made of compounds or mixtures be clearly labeled as compounds). Consumption of animal products has been linked to, *inter alia*, heart disease, cancer, diabetes, and stroke. Mem. Op. at 4. Large-scale agriculture also increases the risk of infectious disease. *Id.* Accordingly, the APCIA seeks to fulfill the imperative state duty to protect human health and safety by decreasing the overall consumption of animal products.

Second, states have a strong interest in protecting the environment. *See New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994) ("The protection of the environment and conservation of natural resources-including marine resources are areas of 'legitimate local concern.'" (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981))). In *Maine v. Taylor* the Supreme Court reversed the lower court's holding that a Maine law prohibiting the importation of baitfish from other states violated the dormant Commerce Clause. 477 U.S. 131, 132–33 (1986). The Court accepted the state's argument that "shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways." *Id.* at 140–42. The Court explained that alternative means of protecting native species and the environment from these harms were not readily available and thus upheld the facially discriminatory statute. *Id.* at 143–44. Likewise, New York has a significant interest in protecting its ecology and natural resources. According to the affidavits of scientific experts, large-scale farming causes water pollution from agricultural runoff and air pollution from manure, and contributes to increased concentrations of greenhouse gasses. Mem. Op. at 8–11. New York seeks to protect the environment by reducing the amount of large-scale farming. The state enacted APCIA to achieve this reduction by informing consumers of the negative environmental effects of consuming animal products and thereby deterring their consumption. *Id.* at 20.

Third, the state has a compelling interest in safeguarding animal welfare. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993) (acknowledging state interest in preventing animal cruelty); *United States v. Stevens*, 130 S. Ct. 1577, 1583, 1585 (2010) (explaining that all fifty states have animal cruelty laws and that the protection of animals

has a long history in U.S. law). Large-scale agriculture poses numerous problems for animal welfare, including branding, dehorning, improper handling and painful slaughter among other issues. *See* Mem. Op., add. B at 1–21. In enacting the APCIA, New York seeks to advance its interest in preventing cruelty to animals by decreasing demand for animal products, thereby reducing the amount of animals kept for large-scale agriculture. Mem. Op. at 3.

Adequate but less discriminatory alternative means for promoting these goals are not readily available. Placing information on a placard at the place of purchase is particularly effective because it should reach all consumers considering purchasing animal products. Providing a link to a website with further information allows persons to more fully investigate the negative effects of animal products, increasing consumer awareness about food choices, thus promoting public health. Furthermore, nothing in the APCIA promotes New York animal products or specifically discourages the consumption of out-of-state products. It is thus difficult to imagine an alternative that would have a *less* discriminatory impact.

Finally, the New York State legislature passed the APCIA in order to begin reducing animal product consumption through an information campaign while it works to implement stronger regulations. Mem. Op. at 3. That the legislature chose this form of regulation indicates that other options are likely politically or economically infeasible at this time. *See Maine*, 477 U.S. at 143 (holding that there were no adequate alternatives because technology to determine which baitfish might cause harm was "currently unavailable"). Thus, even if this Court were to find the APCIA discriminatory, the statute would remain valid because it advances compelling state interests that are not adequately promoted by available alternative means.

B. The APCIA Does Not Excessively Burden Interstate Commerce Because it Imposes the Same Burden on In-State and Out-of-State Animal Product Producers and Promotes Several Local Benefits.

A nondiscriminatory statute "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). To fail this balancing test, a statute's burden on interstate commerce must be "qualitatively or quantitatively different" from the burden it imposes on intrastate commerce. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir. 2003) (quoting *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001)) (upholding a New York statute prohibiting direct shipment of cigarettes to consumers because incidental burden on interstate commerce did not outweigh state interests in preventing tobacco use by minors and reducing tobacco use generally); *see also Minnesota*, 449 U.S. at 471–72 (upholding a statute that regulated "evenhandedly" by prohibiting all nonreturnable milk cartons regardless of their place of origin). A statute may burden interstate commerce if (1) it shifts regulation costs out of state, (2) requires "out-of-state commerce to be conducted at the regulating state's direction," or (3) interferes with the interstate flow of the regulated goods. *American Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003). "The extent of the burden that will be tolerated" depends on the nature of the local interests and the availability of alternative actions that would have a less significant impact on interstate commerce. *Pike*, 387 U.S. at 142. Finally, though the *Pike* test requires courts to balance competing interests, courts should not "second-guess" the legislature's findings, *Brown & Williamson*, 320 F.3d at 209, or conclusions concerning the utility of the statute under review, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987).

The APCIA does not burden interstate commerce. First, the APCIA does not shift regulation costs out state. By its terms, the statute requires anyone selling animal products for human consumption to place placards near such goods. Intrastate retailers presumably absorb

any costs associated with the placards. Second, the APCIA does not direct out-of-state commerce. Nothing in the statute requires action from out-of-state producers, nor does any provision of the statute prevent out-of-state producers from selling their products freely in New York. Third, the APCIA does not interfere with the flow of animal products in interstate commerce. Similar to the statute upheld in *Minnesota v. Clover Leaf Creamery Co.*, which impacted both in-state and out-of-state dairies by prohibiting the use of nonreturnable milk containers in the state, the APCIA's placard requirement may reduce demand for both in-state and out-of-state animal products. 449 U.S. at 471–72. Such an equivalent impact does not excessively burden interstate commerce. *See id.* Furthermore, although the placard directs consumers to a website that includes a list of sustainable and humane farms in New York and does not list farms in others states, the NMPA has not offered proof evincing that this passive list has any impact on the flow of animal products into New York. *See supra* at III.A. The NMPA has failed to prove that any sustainable or humane out-of-state farms sell animal products in New York and are thus burdened by the list of intrastate farms and thus should not have been granted summary judgment.

Any incidental burden the APCIA may impose on interstate commerce is not excessive in view of the multiple legitimate local interests the statute advances. The APCIA is similar to the statute upheld in *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200. In that case, the court held that a New York law prohibiting cigarette retailers from shipping cigarettes directly to individuals had, at most, *de minimis* effects on interstate commerce and promoted the state's important interest in decreasing tobacco use. *Id.* at 217. Similarly, protecting human health and safety, preserving natural resources and the environment, and safeguarding animal welfare are important functions of the state, each of which are advanced by APCIA. *See supra* at III.A. The

district court argued "there are other ways in which the state could have promoted the same local interests." Mem. Op. at 20. As discussed in Part III.A, however, the legislature chose to enact APCIA because other regulations designed at advancing these same interests will take longer to implement and are thus not immediately available. Mem. Op. at 3. For these reasons, the APCIA does not excessively burden interstate commerce.

C. The APCIA Does Not Control Extraterritorial Commerce Because It Applies Only to Sellers of Animal Products Within New York State.

A statute controls extraterritorial commerce if it directly regulates "commerce occurring wholly outside the boundaries" of the state. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (holding that Connecticut statute that prevented out-of-state beer shippers from selling beer at a higher price in Connecticut than in bordering states violated dormant Commerce Clause). *See also S. Pac. Co. v. State of Arizona*, 325 U.S. 761, 775 (1945) (explaining that Arizona law limiting the length of trains passing through its territory violated the dormant Commerce Clause because, in effect, it regulated the length of trains beyond state boundaries).

The APCIA does not regulate commerce wholly outside the boundaries of New York because it does not regulate out-of-state commerce at all. Unlike the statute at issue in *Southern Pacific Co. v. State of Arizona*, *S. Pac. Co.* 325 U.S. at 775, the APCIA does not require anyone to take, or abstain from, any action outside of the boundaries of New York State. *See* APCIA, N.Y. Agric. & Mkts. Law § 1000. The APCIA merely requires New York retailers and restaurants to post placards. *Id.* The statute thus does not control extraterritorial commerce.

D. Even if the APCIA's Website Content Is Held Unconstitutional, That Portion Should Be Severed Because the Remainder of the APCIA Serves the State's Legislative Purpose.

Courts should avoid invalidating an entire statute when only part of it violates the Constitution. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Gary D. Peake*

Excavating Inc. v. Town Bd. of Hancock, 93 F.3d 68, 72 (2d Cir. 1996). Courts can sever the invalid portion of a state statute and preserve the remainder if such severance is in accordance with state law. *Gary D. Peake*, 93 F.3d at 72. Under applicable New York law, courts should consider how the statute would operate without the severed part and ask, "whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." *Id.* at 72–73 (severing the unconstitutionally discriminatory provision of a waste-dumping ordinance because the legislature's purpose was served by the remainder of the ordinance). Though some statutes specifically include savings clauses directing the courts to sever any invalid portions, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968).

Though APCIA does not include a savings clause, the legislature would want the statute to stand even if the list of sustainable and humane farms on the state website were to be found unconstitutional. The statute is analogous to the one reviewed in *Gary D. Peake Excavating Inc. v. Town Bd. of Town of Hancock* in that after severing a provision, the remainder would continue to advance the legislature's purpose. *See Gary D. Peake*, 93 F.3d at 72–73. The effect of the APCIA *with or without* the list of farms is to reduce consumption of animal products. The list of farms may help protect the environment and animal welfare by pointing to farms that are better at advancing those interests than others, but the goal of the statute itself is to reduce consumption, not transfer it to sustainable and humane farms. All three interests, human health, environmental protection and animal welfare, are promoted by the placard and the web content that details the adverse effects of consuming animal products. Furthermore, the APCIA itself does not dictate the content of the website, it merely provides that a link to the website must be

on the required placards. Instead, experts who testified before the committee that recommended APCIA provided the information for the website. It is thus reasonable to infer that the legislature *may* not have specifically intended any list of New York farms to appear on the website. Thus, assuming *arguendo* that the list of farms violates the dormant Commerce Clause, the Court can sever that portion of APCIA and preserve the remainder of the statute.

In sum, the APCIA does not violate the dormant Commerce Clause because it does not discriminate against or excessively burden interstate commerce, and the portion of the law most closely related to interstate commerce can be severed from the rest of the statute.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed in part and reversed in part and remanded.