Case No.: CV 11-55440 NCA (ABCx)

IN THE UNITED STATES COURT OF APPELAS
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.

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

BRIEF OF APPELLANTS

JANUARY 11, 2013 TEAM 1

Oral Argument Requested

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STATEMENT OF THE CASE

The Defendant, State of New York, enacted the Animal Products Consumer Information Act (APCIA), N.Y. Agric. & Mkts. Law § 1000, requiring the placement of placards where animal products are sold and creating a website to educate the public about the hazards associated with the consumption of animal products. *Nat'l Meat Producers Ass'n v. Comm'r of New York State Dep't of Agric & Mkts.*, No. CV 11-55440 NCA (ABC), slip op. at 2 (S.D.N.Y. Sept. 15, 2012). The Plaintiff initiated this action for declaratory judgment, alleging that the APCIA was preempted by the Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 601-678, and was unconstitutional under the Commerce Clause. *Nat'l Meat Producers Ass'n*, slip op. at 2.

On September 15, 2012, the District Court granted summary judgment to the Plaintiff, holding that the APCIA was not preempted by the FMIA, but the fact that the website listed only New York farms meeting its certification standards was unconstitutional under the Commerce Clause. *Id.* at 18, 21. On September 15, 2012, Defendant filed this timely appeal to the Second Circuit of the United States Court of Appeals seeking to reverse the decision of the District Court for the Southern District of New York which granted summary judgment in favor of the Plaintiff.

STATEMENT OF THE FACTS

In 2010 state of New York (hereinafter "the State") enacted the Animal Products Consumer Information Act (hereinafter "APCIA"). *Nat'l Meat Producers Ass'n*, slip op. at 1. The Act requires retailers of animal products intended for human consumption to display a placard stating:

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

Id. at 2.

The purpose of the APCIA is to "protect the citizens of [the] [S]tate by providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively affects human health and the environment, and imposes unnecessary suffering on animals." *Id.* at 3. The State Legislature passed the APCIA as a way for the State to reduce costs, without reducing State benefits. *Id.* The Long-Term Reduction of Government Costs Without Cutting Benefits Committee (hereinafter "the Committee") heard over 1,000 hours of expert testimony focused on healthcare and the environment. *Id.* Based on these hearings the committee recommended, among other things, 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." *Id.* The State Legislature responded by passing "the APCIA to encourage consumer education" regarding the issues surrounding consumption of animal products. *Id.*

The majority of the health and nutrition experts who testified before the Committee

concluded that a reduction in the consumption of animal products would result in the prevention, and in many cases reversal of heart disease, cancers, type 2 diabetes, stroke, and hypertension, which are four of the top seven causes of death in the United States each year. *Id.* at 4. Dr. Campbell, a professor at Cornell University, testified before the committee regarding the health effects of diet. *Id.* at 5. His research has shown that a whole food, plant based diet can reverse or prevent these diseases. *Id.*

Furthermore, the experts also linked animal agriculture to infectious disease. *Id.* at 4. The Union of Concerned Scientists testified before the Committee that the use of antibiotics in concentrated animal feeding operations (hereinafter "CAFOs") "for non-therapeutic purposes . . . contributes to the development of antibiotic-resistant pathogens that are . . . difficult to treat." *Id.* at 6. Every year pathogens caused by animal sources result in "tens of millions of infections and many thousands of hospitalizations." *Id.* Salmonella alone costs "$2.5 billion per year" and has a mortality rate of "88 percent." *Id.* In recent decades there has been a "75 percent" increase animal born infectious disease, and "[a]bout 300 new animal-to-human diseases have emerged in the last 60 years." *Id.* at 7. Taken together, every year animal borne infectious diseases result in "2.5 billion cases of human illness . . . and 2.7 million human deaths worldwide." *Id.* The experts concluded that "a reduction in these diseases would lead to a reduction in the cost of health care for both individuals and the state." *Id.* at 4.

Not only do CAFOs have a negative impact on human health they also affect the health of the environment. *Id.* at 8. The Union of Concerned Scientists testified before the Committee that CAFOs impose significant, but unaccounted for costs on taxpayers. *Id.* The improper disposal of animal waste generated by CAFOs has led to drinking water contamination in many areas. *Id.* at 9. Remediation for such contamination in New York has cost approximately $56

million. *Id.* In addition, nutrient pollution from CAFOs are identified as a major source of contamination in 23 percent of impaired water bodies in the State. *Id.* Finally, the Food and Agriculture Organization of the United Nations has found that animal agriculture is a major emitter of all three types of greenhouse gases. *Id.* at 10.

The state legislature also found that the humane treatment of animals was an important public interest and added language to the placard's text stating, "some animal handling and confinement techniques also lead to animal suffering." *Id.* at 3. Some examples of these practices include preventing pigs from performing their natural and instinctive nesting habits; using gestation crates which are so small they prevent sows from even turning around; tail-docking of dairy cows; debeaking and toe-clipping of hens; and placing egg-producing hens in extreme confinement that prevents them from performing their natural habits, such as dustbathing and nesting. *Id.* Addendum B at 4, 5, 10, 16, 17, 18. The placard also directs consumers to a state sponsored website, www.informedchoice.ny.gov, which provides additional information about "the health effects of consuming animal products and the impact of animal agriculture on the environment and animal suffering," and includes a list of farms certified by the state as environmentally sustainable and meeting animal welfare standards. *Id.* at 4.

SUMMARY OF THE ARGUMENT

This case is about a state's right to enact legislation to protect the health and welfare of its citizens, a power which the Supreme Court has held is traditionally left to the states. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 479 (1996). The display of a placard that provides consumers with information regarding the health, environmental, and animal welfare concerns attached to consumption of animal products is not preempted by APCIA. The State enacted the APCIA to protect the public health and provide the public with important information necessary to protect the general welfare by requiring retailers of animal products intended for human consumption to display a placard with a public interest warning regarding the potential effects of consuming animal products. While the FMIA regulates the labeling of meat products it does not expressly preempt the APCIA's placard posting requirement. FMIA's express preemption clause only applies to written, printed, or graphic matter accompanying a meat product, and the State's placard does not accompany a meat product because it does not supplement or explain the product being sold. Furthermore, the express preemption clause of the FMIA should be read narrowly because the APCIA regulates the public health, an area traditionally left to the states.

Additionally, the APCIA is not implicitly preempted by the FMIA because there is no conflict preemption or field preemption. The APCIA and FMIA do not conflict because it is physically possible to comply with both since each statute regulates a different area. Furthermore, there is no conflict preemption because APCIA does not interfere with the accomplishment of a federal objective. Finally, APCIA is not preempted under field preemption because APCIA and FMIA regulate different fields. The APCIA is concerned with the dissemination of information concerning the effects of animal product consumption while the

FMIA regulates meat commerce. However, even if both laws do regulate the same field Congress did not intend to regulate the entire field of meat commerce when it passed the FMIA.

In addition, the APCIA does not violate the Commerce Clause. The APCIA applies evenhandedly to both in-state and out-of-state animal products and, therefore, it does not impose any barriers on interstate commerce. Furthermore, the APCIA was enacted for legitimate state interests. The purpose of the APCIA was to educate New York citizens about the impact of the consumption of animal products on human health, the environment, and animal welfare. *Nat'l Meat Producers Ass'n*, slip op. at 3. The state heard testimony from health and nutrition experts, the majority of whom "concluded that a reduction in the consumption of animal products would result in the prevention and, in many cases reversal of, [sic] heart disease, cancers, type 2 diabetes, stroke, and hypertension." *Id.* at 4. The APCIA also required the creation of a website that provides additional, detailed information to New York's citizens. *Id.* This website includes a list of New York farms the State determined were both environmentally sustainable and employed humane welfare standards. *Id.* This list does not impose any burden on interstate commerce. While the list only includes New York farms, it does not state that only New York farms meet these standards, nor does it encourage the purchase of New York animal products over out-of-state products. Even if this did impose a burden, it would be minimal and significantly outweighed by the State's interests in preventing these illnesses, protecting the environment, and improving animal welfare.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN FINDING THAT THE APCIA IS NOT PREEMPTED BY THE FMIA BECAUSE (1) THE ACT DOES NOT EXPRESSLY PREEMTPT THE STATE LAW AND (2) THE STATE LAW IS NOT IMPLICITLY PREEMPTED BECAUSE IT DOES NOT CONFLICT OR REGUALTE A FIELD OCCUPED BY THE FEDERAL GOVERENTMENT.

The first issue before the Court is governed by the Supremacy Clause of the United States Constitution which provides: "the Law of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2; *see also Pliva Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011). The inquiry must begin with a determination of whether congress, has prohibited the state regulation of the particular aspect of commerce at issue. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Congress can expressly or implicitly preempt a state common law action. *Cipollone v. Ligette Group, Inc.*, 505 U.S. 504, 516 (1992). Implied preemption is divided into two subcategories: conflict and field preemption. *Id.* In every preemption case Congress's intent is the "ultimate touchstone." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). To determine Congress's intent, the courts look at the statute, the statutory framework, the structure and purpose of the statute as a whole, and the legislative history, surrounding the legislation's enactment. *Medtronic, Inc.*, 518 U.S. at 484, 488, 492. Particularly in preemption cases "in which Congress has 'legislated ... in a field which the States have traditionally occupied,' . . . [the courts] '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.'" *Wyeth*, 555 U.S. at 565 (quoting *Medtronic*, 518 U.S. at 485). Traditionally, States have used their police powers to protect the health and safety of their citizens. *Id.* at 475-76.

In the present case the Animal Products Consumer Information Act is not preempted by

the Federal Meat Inspection Act because: A) The State law's requirement that retailers of animal products intended for human consumption display a public interest warning does not constitute labeling under the Federal Meat Inspection Act and is therefore not expressly preempted by the federal law; and B) the Animal Products Consumer Information Act is not implicitly preempted by the Federal Meat Inspection Act.

A. *The APCIA is not expressly preempted by the FMIA*

A state law is expressly preempted when there is an express congressional command stated in the text of the statute. *Cipollone*, 505 U.S. at 516. Where Congress has included preemptive language, the court "need not go beyond the language to determine whether Congress intended to pre-empt . . . some state law, but the court must "identify the domain expressly preempted." *Medtronic, Inc.*, 518 U.S. at 484.

The FMIA's express preemption provision[1] does not apply to the APCIA because the placard required to be displayed by APCIA does not constitute a label. Furthermore, because the area regulated by the APCIA is one traditionally left to the states the FMIA's preemption clauses should be narrowly interpreted.

The FMIA defines labeling as "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 21 U.S.C. § 601(p). Because the placard at issue in the present case is not placed directly on any product, but rather is displayed in retail stores, it does not satisfy the first definition of labeling. *Id.*; *Nat'l Meat Producers Ass'n*, slip op. at 2. For example, in *Kordel v. U.S.*, 335 U.S. 345

[1] "The FMIA states that marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State." *Nat'l Meat Producers Ass'n*, slip op. at 2. Additionally "the FMIA states, "[t]his chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." *Id.*

(1948), the Supreme Court narrowly interpreted the word accompany in the preemption clause of the Federal Food, Drug, and Cosmetic Act, which contains a definition of labeling identical to the one in FMIA,[2] as materials that supplement or explain it. *Id.* at 350. The Court held that booklets provided by the manufacturer to retailers to hand out to consumers, and which contained information relating to the efficiency of the product, was preempted by the Federal Food Drug and Cosmetic Act because they accompanied the product. *Id.* at 346, 350, 352.

Unlike, in *Kordel*, the information provided by the placard under the APCIA does not accompany the product because it does not supplement or explain it. *Nat'l Meat Producers Ass'n*, slip op. at 2. In *Kordel*, the information provided by the manufacture explaining the efficiency of the product was found to accompany it because it supplemented or explained the product. In the present case the information being provided provides general information about animal products to consumers, it does not supplement or explain the contents of the product, the size or weight of the product, or the use of the product. Furthermore, the information provided in the present case is not provided by the manufacturer of the product to advertise or inform consumers about what the product is, but rather is provided by the State to help consumers make informed decisions regarding issues that have an impact on their health, the environment, and animal welfare.

Additionally, the FMIA's express preemption clause should be read narrowly, because it interferes with an area traditionally left to the states. For example, in *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326 (5th Cir. 2007), the court found that while FMIA contains an express preemption clause, which prohibits states from imposing different marking, labeling,

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[2] "The term labeling is defined in s 201(m) 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 any such article." *Kordel*, 335 U.S. at 347-48 (citing 21 U.S.C. § 201(m)).

packaging, or ingredient requirements, the preemption clause is only "concerned with the methods, standards of quality, and packaging that slaughterhouses use." *Id.* at 333. The court held that a state law that defined which meats were to be available for human consumption did "not infringe upon the territory preserved to the federal government by the FMIA's preemption clause." *Id.*

Furthermore, in *Medtronic, Inc. v. Lohr*, the plaintiff brought a common law tort action alleging defective design against a medical device manufacturer. 518 U.S. at 479. The federal statute required manufacturers of new medical devices to provide proof to the Food and Drug Administration that the product was safe and effective. *Id.* at 475. Traditionally the protection of health and safety is a matter left to the states. *Id.* Because a broad reading of the statute's preemptive language would have caused the federal statue to intrude into state sovereignty the Court limited its reading of the preemptive language. *Id.* at 485. Rather, the Court read the preemptive language in light of other statutory language, and held that the plaintiff's state common law claim was not preempted by the Medical Device Amendments of 1976. *Id.* at 475, 496.

In the present case the State law concerns the health and safety of its citizens, requiring retailers of animal products to display a placard warning of the effects on health, environmental, and animal welfare resulting from consumption of animal products. *Nat'l Meat Producers Ass'n*, slip op. at 2-3. Therefore, like in *Empacadora de Carnes de Fresnillo*, where the state law was found not to violate the preemption clause of FMIA because the law did not concern the methods, standards of quality, and packaging that slaughterhouses use, neither does the state law at issue in this case.

Like in *Medtronic*, where the Court narrowly interpreted an express preemption clause

because it interfered with traditional authority of the states to regulate health and safety, this Court should also narrowly interpret the express preemption clause in FMIA because it infringes upon the State's right to regulate health and safety. The stated purpose of the APCIA is to "protect the citizens of the 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." *Nat'l Meat Producers Ass'n*, slip op. at 3. Therefore, the APCIA's requirement that retailers of animal products intended for human consumption display the placard is a clear instance of the State exercising its police power. *Id.* at 2. The State determined, after thousands of hours of testimony, that the "reduction of the public's consumption of animal products . . . would . . . reduce the long term health care and environmental costs to the state." *Id.* A majority of the health and nutrition experts who submitted affidavits to the district court concluded that "a reduction in the consumption of animal products would result in the prevention and, in many cases reversal of, heart disease, cancer, type 2 diabetes, stroke, and hypertension. Four of these diseases are in the top seven causes of death in the united States each year." *Id.* at 4. Because the APCIA clearly regulates areas traditionally left to the states the Court should narrowly interpret FMIA's preemption clause.

B. *The APCIA is not implicitly preempted by the FMIA*

There are two types of implied preemption: conflict and field preemption. *Cipollone Inc.*, 505 U.S. at 516. Conflict preemption occurs when it is physically impossible to comply with both the state and federal law or where "a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Com'n*, 461 U.S. 190, 204 (1983);

Empacadora de Carnes de Fresnillo, 476 F.3d at 334. Field preemption occurs when a "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone, Inc.*, 505 U.S. at 516. Field preemption requires clear Congressional intent. *Empacadora de Carnes de Fresnillo*, 476 F.3d at 334.

The APCIA is not implicitly preempted by the FMIA because the acts do not conflict, and this is not an area in which Congress has preempted the field. The APCIA and the FMIA do not conflict because (1) it is physically possible to comply with both laws because each regulates a different area, and (2) the APCIA does not interfere with the accomplishment of a federal objective. Finally, the APCIA is not preempted under field preemption because the two laws regulate different fields. The FMIA regulates meat commerce and the APCIA animal product information. Furthermore, even if both laws regulated the same field, Congress did not intend to regulate the entire field of meat commerce when it passed the FMIA.

It is physically possible to comply with both the APCIA and the FMIA because the state and federal law do not create requirements regarding the same issue. In *Pliva, Inc. v. Mensing*, the Court found impossibility preemption of common law actions against manufacturers of generic drugs for inadequate warning labels because the generic drug's manufacturer would have been unable to comply with both federal law and the state common law requirements. *Pliva*, 131 S. Ct. at 2572, 2573, 2577. In that case, FDA required the safety labeling proposed for new generic drugs be the same as the labeling approved for the brand name drug. *Id.* at 2574. The result was that a "manufacturer[] seeking generic drug approval . . . [had to ensure] that its warning label [was] the same as the brand name's." *Id.* Consequently, the Court found impossibility preemption because the state law would have required the generics' manufacturers to use different or stronger warnings, violating the federal law. *Id.* at 2577.

Unlike, in *Pliva*, where the state law at issue would have required generic prescription drug manufacturers to provide different information on the label than that provided by the name brand prescription drug, which directly conflicted with the federal requirement that the generic have the same labeling as the name brand prescription drug, in the present case the APCIA does not require labeling as defined in the FMIA. 21 U.S.C. § 601(p). Because the APCIA is not a labeling requirement for meat products it does not conflict with the FMIA regulation of meat product labeling.

Further, the APCIA does not interfere with the accomplishment of FMIA's goal. For example in *Empacadora de Carnes de Fresnillo*, the court stated that the goal of FMIA is to assure that meat and meat food products distributed to consumers are wholesome, not adulterated, and properly marked, labeled, and packaged. *Id.* at 334. In that case the court held that a state law prohibiting the sale of horsemeat did not stand as an obstacle to congresses goals in enacting FMIA and was not implicitly preempted. *Id.* at 334-35.

Like in *Empacadora de Carnes de Fresnillo*, where the court held that a state law prohibiting the sale of horsemeat did not stand as an obstacle to Congress's objectives, the state law in the present case is not an obstacle. The State law at issue in this case does not inhibit the distribution to consumers of wholesome, unadulterated, and properly marked, labeled, and packaged meat and meat food products. APCIA does not stand as an obstacle to the proper labeling of the weight of a meat product. Rather than impose a labeling requirement APCIA provides consumers with notice of the possible health and environmental effects of consuming animal products which does not conflict with the goals of FMIA.

Finally, the FMIA and APCIA do not occupy the same field, and even if they do Congress did not intend to completely preempt the field of meat commerce. In *Empacadora de*

Carnes de Fresnillo, the court held that there was not field preemption in a case involving FMIA because the act specifically indicates that there is no field preemption. *Id.* at 334. FMIA states "that it shall not preclude any State from making requirements or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter" congress did not intend it to preempt the field. *Id.*

In the present case, like in *Empacadora de Carnes de Fresnillo*, FMIA has not preempted the field because the act specifically allows the states to act in the field of meat product regulation. Furthermore, even if this Court were to find that there was field preemption APCIA does not regulate in the same field as FMIA, which is concerned with meat commerce while APCIA regulates the provision of information to the public concerning animal products generally. *Nat'l Meat Producers Ass'n*, slip op. at 2.

The display of a placard that provides the public with information regarding the health, environmental, and animal welfare concerns caused by consumption of animal products is not preempted by APCIA. The APCIA requirement that retailers of animal products intended for human consumption display a placard with a public interest warning regarding the potential effects of consuming animal products was not expressly preempted by the FMIA, which regulates the labeling of meat products, the FMIA's express preemption clause only applies to written, printed, or graphic matter accompanying a meat product, and the plaque does not accompany a meat product, but rather animal products. Further, the express preemption clause of the FMIA should be read narrowly because the APCIA regulates the public health, an area traditionally left to the states. Additionally, the APCIA is not implicitly preempted by the FMIA because there is not conflict or field preemption. There is not conflict preemption because it is physically possible to comply with both the APCIA and FMIA since each regulates a different

area. Furthermore, this is not a case involving conflict preemption because the APCIA does not interfere with the accomplishment of a federal objective. Finally, the APCIA is not preempted under field preemption because the APCIA and FMIA regulate different fields. The APCIA is concerned with the dissemination of information concerning the effects of animal product consumption while the FMIA regulates meat commerce. However, even if both laws do regulate the same field Congress did not intend to regulate the entire field of meat commerce when it passed the FMIA.

II. THE APCIA DOES NOT VIOLATE THE COMMERCE CLAUSE BECAUSE IT APPLIES EVENLY TO IN-STATE AND OUT-OF-STATE ANIMAL PRODUCTS, IT IS SUPPORTED BY LEGITMATE STATE INTERESTS THAT OUTWEIGH ANY POTENTIAL BURDEN ON INTERSTATE COMMERCE, AND THERE ARE NO PRACTICABLE ALTERNATIVES.

The Commerce Clause gives Congress the power to "regulate Commerce . . . among the several States," but also creates limits on the extent to which states can interfere with interstate commerce. U.S. Const. art. I, § 8, cl. 3; *Am. Trucking Ass'n, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005). This limitation, referred to as the dormant Commerce Clause, prohibits states from "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Am. Trucking Ass'n, Inc.*, 545 U.S. at 433 (citing *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)). However, the Supreme Court has held that "[w]here 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." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

In *Pike*, Arizona created the Fruit and Vegetable Standardization Act, which required all cantaloupes grown in Arizona and offered for sale to be packed within that state. *Pike*, 397 U.S.

at 138. The purpose of the act was to prevent the shipping of "inferior or deceptively packaged produce," which was tarnishing Arizona's reputation. *Id.* at 143. The plaintiff company shipped their cantaloupes to Blythe, California, 31 miles away, for packing and processing. *Id.* at 139. There was nowhere else nearby within the state of Arizona the company could ship to, and, therefore, the act would have effectively compelled the plaintiff to build its own packing facilities. *Id.* at 139-40. The Court held that where there is a legitimate purpose, the courts must balance the burden against the legitimate state interest. *Id.* at 142. The Court stated, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

The Court held that there is a legitimate state interest in "maximizing the financial return to an industry within it," and, thus, the Arizona act was created to effectuate a legitimate state interest. *Id.* at 143. However, the produce that was being shipped to California for processing and packaging was not packaged with Arizona's name on it and, therefore, would have no impact on the state's reputation. *Id.* at 144. The state was attempting to use this produce to enhance its reputation rather than protect it. *Id.* While the Court found a legitimate state interest in requiring interstate cantaloupe purchasers to know the produce was grown in Arizona, this interest was too tenuous to justify the burden of requiring the plaintiff company to build a packing plant in that state. *Id.* at 145.

Similarly, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), North Carolina enacted a statute prohibiting containers of apples "sold, offered for sale, or shipped into" the state from bearing any grade other than the United States Department of Agriculture (USDA) grade. *Id.* at 335. The stated purpose of this act was to protect North

Carolina citizens from fraud and deception in the apple market arising from states using their own grading systems. *Id.* at 349. Since the Washington apple industry used preprinted packaging, it would have been required to use costly and less efficient methods of packaging in order to meet the standards set out by the statute, while the North Carolina apple industry would be unaffected. *Id.* at 350-51. Furthermore, because the Washington grading system was superior to the USDA's, the use of the USDA grading meant Washington apples would be effectively "downgraded." *Id.* at 351. The Court held that when such discrimination is "demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* at 353. The Court found that the statute did little to reduce the confusion and deception caused by the different grading systems because it allows the packaging to contain no grade and the packaging that was being regulated was purchased by wholesalers and brokers, not be the consumers. *Id.* at 353. Furthermore, there were alternative methods for reducing the confusion, such as requiring the USDA grading system to be present on all packaging. *Id.* For these reasons, the North Carolina Statute violated the dormant Commerce Clause.

In 1985, this Court held that the *Pike* balancing test applies when a state statute "'regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental.'" *Grocery Mfrs. of America, Inc. v. Gerace*, 755 F.2d 993, 1003 (2d Cir. 1985) (quoting *Pike*, 397 U.S. at 142). In *Grocery Manufacturers*, a New York law was enacted requiring alternative cheese products to be prominently labeled "imitation." *Id.* at 997-98. This Court held that this statute regulates evenhandedly because it does not distinguish between alternative cheese products from in-state and out-of-state manufacturers. *Id.* at 1003. Furthermore, states have a legitimate interest in regulating foods

produced or marketed within their borders. *Id.* at 1003 (citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144 (1963)). New York had legitimate nutritional concerns regarding imitation cheese, supported by the strong debate among health and nutrition professionals. *Id.* at 1003-04. When a law regulates evenhandedly for a legitimate interest, this Court held that "'[o]nly if the burden on interstate commerce *clearly outweighs* the State's legitimate purposes does such a regulation violate the Commerce Clause.'" *Id.* at 1005 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981)). This Court found that the labeling only placed a minor burden on commerce and advanced an important state interest. *Id.* at 1005. Furthermore, the use of a different term or requiring smaller signs would not "both serve the local interest and have a lesser affect on commerce." *Id.* Therefore, this Court held there was no violation of the Commerce Clause.

Finally, in *American Trucking*, the state of Michigan imposed a flat fee on trucks that engaged in intrastate commerce. 545 U.S. at 431. The plaintiff argued that because trucks that carry interstate commerce also participate in intrastate commerce, but do so less than those who only participate in intrastate commerce, the flat fee charged was an unconstitutional burden upon interstate trade. *Id.* at 432. The Court stated that state regulations that "unjustifiably discriminate on their face against out-of-state entities," *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), or "'impose burdens on interstate trade that are 'clearly excessive in relation to the putative local benefits'" are considered unconstitutional. *Id.* at 433 (quoting *Pike*, 397 U.S. at 142). First, the Court found there was a lack of evidence that the fee "significantly deters interstate trade," which meant that there was no evidence of any objectionable exercise of the state's authority. *Id.* at 434-35. The Court held that plaintiffs are required to show proof of "a burdensome or discriminatory impact upon interstate trucking, or (presumably) the unfairness of the assessment

in relation to defrayed costs, or (presumably) the administrative practicality of the alternatives." *Id.* at 436. Second, the Court held that an alternative system, such as a per-mile fee which would require the creation of a "data accumulation system," was impracticable. *Id.* at 436 (citing *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175 (1995) (holding that a state is not required to use a particular apportionment formula just because it may be possible to do so)).

When a state's regulations place a burden on interstate commerce, the courts first determine whether the regulation applies evenhandedly. If so, the courts determine whether there is a legitimate state interest and whether that interest outweighs the burden placed on interstate commerce. In this case, as the District Court concluded, the APCIA applies evenhandedly because it treats both intrastate and interstate animal products equally. The placards apply to all animal products sold in New York, regardless of where they are produced. In addition, the placards are the responsibility only of the New York retailers, which protects out of state producers from facing any burden to change the marketing of their products. Since this regulation facially applies evenhandedly, the *Pike* balancing test applies. *Grocery Mfrs.*, 755 F.2d at 1003 (quoting *Pike*, 397 U.S. at 142).

First, New York had many legitimate local interests in creating the APCIA. The purpose of the APCIA was to "protect 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. In deciding to implement such a statute, the New York legislature heard testimony from multiple experts that a reduction in the consumption of animal products would result in the prevention and reversal of many illnesses, such as heart disease and cancer. *Nat'l Meat Producers Ass'n*, slip op. at 4. Furthermore, the use of

Concentrated Animal Feeding Operations (CAFO) poses multiple hazards to human health, such as infectious diseases that are difficult to treat due to non-therapeutic use of antibiotics and from keeping animals in such extreme confinement. *Id.* at 6. According to this Court in *Grocery Manufacturers*, states have a legitimate interest in regulating foods produced or marketed within their borders, especially when health and nutrition are concerned. 755 F.2d at 1003 (citing *Florida Lime & Avocado Growers*, 373 U.S. at 144).

The State also has a legitimate interest in protecting the environment from damage from CAFOs, especially because the estimated cost to New York taxpayers to remedy dairy and hog CAFO environmental damages is $56 million. *Nat'l Meat Producers Ass'n*, slip op. at 9. In addition, protecting animals from cruelty has traditionally been a legitimate state interest, as the District Court held. *Id.* at 19 (citing *U.S. v. Stevens*, 130 S. Ct. 1577, 1585 (2010) ("the prohibition of animal cruelty itself has a long history in American law."); *McGill v. Parker*, 582 N.Y.S. 2d 91, 96 (1992) ("treatment of carriage horses has been a matter of public concern"); *Safarets Inc. v. Gannett Co., Inc.*, 361 N.Y.S. 2d 276, 280 (1974) (humane treatment of animals is in the public interest); *Farm Sanctuary, Inc. v. Dept. of Food & Agric.*, 63 Ca. App. 4th 495, 504 (1998) (statute requiring that animals be treated humanely is in the public interest)). CAFOs prohibit animals from performing their natural and instinctive habits, and often involve procedures that are painful and distressing to the animals, both of which lead to their suffering. *See Nat'l Meat Producers Ass'n*, Addendum B. Finally, the Supreme Court held that a state has a legitimate interest in "maximizing the financial return to an industry within it." *Pike*, 397 U.S. at 143. Therefore, the State has a legitimate interest in promoting its own agriculture in order to maximize the return to that industry.

Once a legitimate interest has been determined, the courts apply the *Pike* balancing test. *American Trucking*, 545 U.S. at 433; *Pike*, 397 U.S. at 142; *Grocery Mfrs.*, 755 F.2d at 1005. The plaintiffs argue that the APCIA imposes a burden on interstate commerce by discriminating against out-of-state farms by only including New York farms on a website. The placards required by the APCIA include the words "For more information, visit www.informedchoice.ny.gov." N.Y. Agric. & Mkts. Law § 1000.4.1. This website provides New York citizens with detailed information regarding health, the environment, and animal welfare standards. *Nat'l Meat Producers Ass'n*, slip op. at 4. In addition, the website provides the names of New York farms the State has certified as environmentally sustainable and meeting animal welfare standards. *Id.* The District Court held that, because this website was state sponsored and was mentioned explicitly in the statute, the inclusion of only New York farms was promoting the purchase of New York animal products over those from outside the state. *Id.* at 20-21.

In *American Trucking*, the Supreme Court held that the plaintiffs have the burden of demonstrating "a burdensome or discriminatory impact." 545 U.S. at 436. The plaintiffs have not demonstrated any burden imposed upon out-of-state animal products by this statute. While the placards and the website were designed to educate New York citizens and reduce the consumption of animal products, the reduction in purchases of animal products equally affects both in-state and out-of-state producers. The website itself merely provides the names of farms the state has certified as environmentally sustainable and meeting humane animal welfare standards. The website does not state that only New York farms meet these standards, nor does it state that New York animal products are superior to animal products from other states. In *Pike* the Supreme Court held that Arizona had a legitimate interest in enhancing the state's own produce reputation. 397 U.S. at 144. Similarly, the New York website is supporting the State's

interest in enhancing the reputation of its own animal product producers. However, unlike *Pike*, in which the state's statute would have imposed a very costly burden on a business by forcing it to create a packaging facility within the state, New York's website imposes no burden. *Id.* at 139-40. Furthermore, unlike the plaintiffs in *Hunt*, in which the out-of-state apple producers would have been forced to change their packaging while the in-state producers would not, neither the APCIA nor the website created by it impose any expense, costs, or barriers on the out-of-state animal products that in-state animal products do not also face. 432 U.S. at 350-51. The Plaintiff has not presented any evidence of a burden placed on them by this website only listing the names of New York farms the state has certified. Without evidence of a burden, there can be no violation of the Commerce Clause.

However, even if including only New York farms did impose a burden on out-of-state animal products, the burden would be minor and significantly outweighed by the legitimate state interests. Here, the only potential burden on the out-of-state animal products, is that New York citizens may choose to purchase New York products that have been certified by the state before purchasing out-of-state products. However, neither the website nor the APCIA encourage this behavior. The website is merely intended to provided further education and awareness to the citizens of New York by providing them with detailed information regarding the impacts on health, the environment, and animal welfare that are created by consumption of animal products and the use of CAFOs. *Nat'l Meat Producers Ass'n*, slip op. at 4. The State's legitimate interests in the health of its citizens and the environmental well-being of the state are the most important interests for a state. The burden imposed in this situation does not reach level of that imposed in *American Trucking*, in which the Court held that imposing a flat fee that was more burdensome on interstate than intrastate trucking was acceptable. 545 U.S. at 433. Furthermore, in *Grocery*

Manufacturers, this Court held that the New York law requiring alternative cheese producers to change the label of the products to include the word "imitation," was outweighed by the state's legitimate interest in the health and nutrition of its citizens. 755 F.2d at 1003-04. There is no similar burden on the out-of-state producers in this case, and the health risks created by the consumption of animal products and the use of CAFOs was presented with definite evidence, unlike in *Grocery Manufacturers* where the health risks of imitation cheese were uncertain. *Id.*

In order to hold that a statute violates the Commerce Clause, the plaintiffs must demonstrate that the burdens imposed are "clearly excessive in relation to the putative local benefits." *Id.* (quoting *Pike*, 397 U.S. at 142). The minor and improbable burden on out-of-state animal products from this website, of New York citizens potentially deciding to purchase products from the State certified farms, is significantly outweighed by the interest of the state in protecting its citizens from the illnesses and infectious diseases that come from the consumption of animal products. Therefore, any burden that may exist is not "clearly excessive in relation" to the extremely important local benefits of protecting the health and well-being of the state's citizens.

Furthermore, the Supreme Court requires the plaintiffs to demonstrate "the administrative practicality of the alternatives," *American Trucking*, 535 U.S. at 436, and the court's decision depends on "whether [the local interest] could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. Unlike in *Hunt*, in which the alternative solutions would not only have removed the burden, but would have been more effective in reaching the state's purpose of reducing confusion and deception in apple packaging, there are no alternatives that would have a lesser impact on interstate activities while promoting the state's interests. 432 U.S. at 353. This case is much more comparable to *American Trucking*.

The state in *American Trucking* would have been required to create an new system for calculating a per-mile fee, which would have required a "data accumulation system," all of which would have been very expensive and impracticable. 545 U.S. at 436. Similarly, forcing New York to include names of farms from outside of the state would significantly increase the costs to the New York Department of Agriculture and Markets. The State would be required to gather information on farms from outside of the state and analyze it according to the New York environmental and welfare standards. The information regarding the New York farms was already available to the state and was easy to provide. Forcing the State to gather outside information would be very costly and impracticable. Plaintiffs may argue that the State should then just remove the names of any farms. However, the purpose of this statute was to provide information on farms and animal product consumption to the public for their health and well-being. Not providing this information does not promote the local interests "as well," and would impair the purpose of the statute. *See Pike*, 397 U.S. at 142.

The dormant Commerce Clause prohibits states from enacting laws that impose barriers on interstate commerce. No such barriers are imposed by the APCIA. The statue applies evenhandedly to reduce consumption of all animal products regardless of whether they are produced within the state or out-of-state. The only potential burden imposed on out-of-state producers is that the website created by the APCIA lists New York farms that have been certified by the state as being environmentally stable and meeting the requirements for humane animal welfare. While this may promote the in-state farms, it does not burden the out-of-state producers and promoting the state's own industries is a legitimate state interest. Even if this were a burden, it is very minimal and is significantly outweighed by the state's legitimate interests in protecting the health of its citizens, the environment, and animal welfare. Furthermore, there are no

practicable alternatives that would impose less of a burden while effectuating the state's purpose to the same extent. For these reasons, the APCIA does not violate the dormant Commerce Clause.

CONCLUSION

For the foregoing reasons, Defendant asks this Honorable Court to reverse the grant of summary judgment and remand this case to the district court for further proceedings.

Dated: January 11, 2013

Respectfully submitted,

Team 1