Case No. CV 11-55440 NCA (ABCx)

IN THE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NATIONAL MEAT PRODUCERS ASSOCIATION,
Appellee,

v.

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

APPEAL FROM THE JUDGEMENT ENTERED IN THE UNITED STATE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

I. Is the Animal Products Consumer Information Act preempted by the Federal Meat Inspection Act?

II. Does the Animal Products Consumer Information Act violate the Commerce Clause of the U.S. Constitution?

STATEMENT OF THE CASE

Appellee, the National Meat Producers Association ("NMPA"), a meat industry trade association, brought an action against Appellants, Commissioner, New York State Department of Agriculture and Markets and the New York State Department of Agriculture and Markets, in the U.S. District Court for the Southern District of New York, alleging that New York's Animal Products Consumer Information Act ("APCIA"), N.Y. Agric. & Mkts. Law § 1000, is unconstitutional, and seeking declaratory and injunctive relief. (R. at 1:19-22.) Specially, the NMPA contends that a provision of the APCIA requiring display of an informational placard wherever animal products are offered for human consumption is preempted by the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§ 601-678 (2006), and that the APCIA "discriminates against out-of-state meat processors and imposes an unreasonable burden on interstate commerce in violation of the" Commerce Clause of the U.S. Constitution. (R. at 1:22-2:5.)

The NMPA filed a motion for summary judgment on both claims. (R. at 2:23-24.) On September 15, 2012, the district court granted the NMPA's motion for summary judgment. (R. at 21:5-6.) The district court correctly concluded that the APCIA is not preempted by the FMIA. (R. at 18:4.) However, the district court incorrectly concluded that the APCIA violates the Commerce Clause. Appellants brought this appeal.

STATEMENT OF FACTS

The APCIA was enacted in 2010 to "protect the citizens of this state by providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively affects health, the environment, and imposes unnecessary suffering on animals." (R. at 3:2-5); N.Y. Agric. & Mkts. Law § 1000.3. It was proposed by a legislative committee convened to look into ways to reduce costs. (R. at 3:6-3:16.) In adopting the APCIA, the New York legislature heard extensive expert testimony and considered multiple studies which indicated that consumption of animal products can have significant, deleterious effects on health, and that animal agriculture can have significant, negative environmental effects, including pollution of the air, water, and soil. (R. at 3:9-11:4.) The legislature also heard testimony "concerning the cruelty to animals in large-scale animal agriculture" and determined that the humane treatment of animals is an important public interest. (R. at 3:22-26.)

In response to these concerns, the New York legislature intended the APCIA to educate consumers and "reduce the long-term health care and environmental costs to the State." (R. at 3:14-16.) To accomplish this purpose, the APCIA requires that retailers display a sign wherever animal products for human consumption are offered that states:

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

N.Y. Agric. & Mkts. Law § 1000.4. The state-sponsored website, www.informedchoice.ny.gov, provides "information on the health effects of consuming animal products and the impact of animal agriculture on the environment and animal suffering." (R. at 4:1-4.) It also provides a

list of farms that New York determined "were environmentally sustainable and employed humane welfare standards[,]" including only farms within New York. (R. at 4:5-8.)

The FMIA prohibits "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter." 28 U.S.C. § 678 (2006). "The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." *Id.* § 601(p). The FMIA also provides that "[t]his chapter 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." *Id.* § 678.

STANDARD OF REVIEW

This Court reviews the "district court's grant of a summary judgment *de novo*[.]" *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012). This Court may affirm the district court's grant of summary judgment only "if, construing the evidence in the light most favorable to the non-moving party, the record shows that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." *Woodford v. Cmty. Action of Greene Cnty., Inc.*, 268 F.3d 51, 54 (2d Cir. 2001).

SUMMARY OF ARGUMENT

The APCIA does not violate the Supremacy Clause or the Commerce Clause of the Constitution because it is neither preempted by the FMIA nor does it unduly burden interstate commerce. As the purpose of the APCIA is to protect human, environmental, and animal wellbeing by providing information to consumers, it operates in a field of traditional state police powers, where there is a strong presumption against federal preemption. *See* N.Y. Agric. & Mkts. Law § 1000.3. Neither the express language of the FMIA nor its legislative history reveal

any intent to prohibit a state from communicating information to its consumers in order to assist them in making informed purchases. The FMIA evidences no congressional intent to occupy the field of commerce in animal products, as demonstrated by its clause preserving power for the state and by the presence of a narrow express preemption clause. *See* 21 U.S.C. § 678 (2006). Furthermore, the FMIA does not preempt the APCIA by conflict because both laws can easily be complied with and the requirement that retailers post placards in no way increases the chance that unwholesome, adulterated, or mislabeled animal products would reach the public.

The APCIA survives a dormant Commerce Clause challenge under both strict scrutiny and the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Nothing about the APCIA suggest a discriminatory purpose, and the presence of only New York farms on the state-sponsored website does not constitute facial discrimination warranting heightened scrutiny because it does not purport to be a complete list of farms that employ certain practices. Thus, *Pike* balancing should apply. The APCIA benefits New York by effectuating its important public interests in protecting the health and environmental safety of New York residents, reducing animal suffering, and disseminating information about the potential negative health effects of consuming animal products. It does not prohibit, forbid, or otherwise interfere with interstate commerce. Any effects the APCIA may have on such commerce are thus de minimis, and hence any incidental burden it places on interstate commerce is far outweighed by the benefits it provides. Furthermore, even if strict scrutiny applies, the means the APCIA employs, including the list of farms on the website, is the least restrictive way to effectuate those critically important state interests. Finally, the APCIA should be exempt from dormant Commerce Clause challenge under an interpretation of the market participant exception.

ARGUMENT

I. THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT IS NOT PREEMPTED BY THE FEDERAL MEAT INSPECTION ACT.

Under the Supremacy Clause of the Constitution, state laws "that conflict with federal law" are held to be preempted and are thus "without effect." *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103 (2d Cir. 2010) (citing *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008)); U.S. Const. art. VI, cl. 2. There are three general types of preemption: "(1) express preemption, where Congress has expressly preempted [state] law; (2) field preemption, 'where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law'; and (3) conflict preemption, where [state] law conflicts with federal law such that it is impossible for a party to comply with both or the [state] law is an obstacle to the achievement of federal objectives." *Town of Clarkstown*, 612 F.3d at 104 (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313 (2d Cir. 2005)).

In determining whether a state law is preempted by federal law, the intent of Congress is key. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (stating that "[t]he purpose of Congress is the ultimate touchstone" in pre-emption). "Congress may manifest its intent to preempt state or local law explicitly, through the express language of a federal statute, or implicitly, through the scope, structure, and purpose of the federal law." *Town of Clarkstown*, 612 F.3d at 104 (citing *Altria Grp.*, 555 U.S. at 76). Due to their nature, field and conflict preemption are normally based on implied congressional intent. *Altria Grp.*, 555 U.S. at 76.

The preemption analysis begins with "a presumption against preemption with respect to areas where states have historically exercised their police powers." *See Town of Clarkstown*, 612 F.3d at 104 (citing *Altria Grp.*, 555 U.S. at 76). As states are independent sovereigns in the federal system, "Congress does not cavalierly preempt" state law. *Medtronic*, 518 U.S. at 485.

Therefore, "in all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' [the court must begin] 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." *Id.* (citations omitted). This presumption against preemption applies both to the question of whether Congress intended to preempt state law at all, and also to questions "concerning the scope of its intended invalidation of state law," such as in construing an express preemption clause. *Id.* (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518-23 (1992)).

A. The APCIA Is an Exercise of New York's Police Power In a Field Which States Have Traditionally Occupied and Therefore There Is a Strong Presumption Against Preemption.

New York was legislating within its historic police powers when it enacted the APCIA, and therefore there is a presumption against preemption. The APCIA was enacted to "protect the citizens of this state by providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively affects health, the environment, and imposes unnecessary suffering on animals." N.Y. Agric. & Mkts. Law § 1000.3. Every aspect of this legislation relates to matters traditionally regulated by the states.

The APCIA is intended to protect New York citizens' health through dissemination of information regarding the deleterious effects of consumption of animal products upon health. *Id.* Regulation of matters related to public health and safety are within the historic police powers of the states. *See Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985) (noting there is a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause").

The APCIA is intended to protect New York citizens' environment from the effects of animal agriculture. N.Y. Agric. & Mkts. Law § 1000.3. These effects include major contributions to the pollution of New York's air due to the operation of concentrated animal feeding operations ("CAFOs"). (R. at 10:2-15 (noting expert testimony that animal agriculture causes significant air pollution)). "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960) (noting that "[i]n the exercise of that power, the states . . . may act . . . concurrently with the federal government").

The APCIA is also intended to protect NY citizens' environment from contamination of New York's water resources due to the operation of CAFOs. (R. at 9:1-10:1 (noting expert testimony that CAFOs cause significant water pollution)). "The abatement and prevention of water pollution is a matter of state concern, and legislation designed to regulate and control such pollution is within the scope of the state's police power." *City of Utica v. Water Pollution Control Bd.*, 5 N.Y.2d 164, 168 (1959) (citations omitted).

Finally, the APCIA is intended to protect New York citizens from imposing unnecessary suffering on animals. N.Y. Agric. & Mkts. Law § 1000.3. "The regulation of animals has long been recognized as part of the historic police power of the States," as an aspect of the States' "authority to provide for the public health, safety, and morals." *DeHart v. Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir. 1994) (citing *Nicchia v. New York*, 254 U.S. 228, 230–31 (1920). This power can include regulation relating to animal welfare. *DeHart*, 79 F.3d at 722. All aspects of the APCIA are thus within the states' historic police powers, including health,

environmental, and animal-related regulation, and accordingly a strong presumption against both express and implied preemption applies. *See Medtronic*, 518 U.S. at 485.

B. The APCIA Is Not Expressly Preempted by the FMIA's Labeling Provision.

The APCIA requires New York retailers to display an informational placard regarding the harmful effects of animal agriculture and consumption of animal products wherever animal products intended for human consumption are sold, in order to further the APCIA's purpose in protecting consumer's health from the effects of consumption of animal products, protecting the environment from the effects of animal agriculture, and preventing unnecessary suffering of animals. N.Y. Agric. & Mkts. Law §§ 1000.3-1000.4.1. The FMIA contains an express preemption provision that prohibits states from imposing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter." 28 U.S.C. § 678 (2006). As noted, express preemption applies when Congress' intent to preempt is "explicitly stated in the statute's language." *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). If the APCIA's placard requirement constitutes "labeling" within the meaning of the FMIA, then the express preemption provision would apply.

"The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 28 U.S.C. § 601(p) (2006). In the only Supreme Court case to consider the preemptive effect of the FMIA's labeling clause, the Court held that a California requirement that meat packages bear labels providing the product's net weight was preempted by the FMIA. *Jones v. Rath Packing Co.*, 430 U.S. 519, 532, 97 (1977). The APCIA, however, does not require anything to be attached upon any animal product or "any of its containers or wrappers[.]" *See* 28 U.S.C. § 601(p) (2006) Thus, the question is whether the informational placard required by the APCIA

constitutes matter "accompanying" animal products, within the meaning of "accompanying such an article" intended by Congress in enacting the FMIA. *See id.*

A plain language reading of the FMIA suggests that matter "accompanying" an animal product within the meaning of the FMIA need not be physically attached to it. *See id.* However, the inquiry does not end there. Where preemptive language in a federal statute conveys congressional intent to preempt *some* state law, this Court must "'identify the domain expressly pre-empted' by that language." *Medtronic*, 518 U.S. at 484 (quoting *Cipollone*, 505 U.S. at 517); *see also Altria Grp.*, 555 U.S. at 543 (holding that when presented with an express preemption provision, courts must determine the "substance and scope of Congress' displacement of state law"). "Since pre-emption claims turn on Congress's intent," this Court must begin as it does "in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (citations omitted). Moreover, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp.*, 555 U.S. at 77 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). As "accompanying" matter could reasonably mean several different things with regard to the origin and purpose of that matter (for example, it could mean "provided by the producer or distributor of the animal product" or it could simply mean "any material related to the animal product, regardless of origin"), the Court must go beyond the text and examine Congress' purpose in enacting the FMIA.

An analysis of the purpose of the FMIA indicates that Congress intended the federal labeling requirement to protect consumers from "fraudulent or deceptive practices by

manufacturers or distributors of regulated products" by regulating the quality of the product and related information provided by producers and distributors, and that thus the term "accompanying" reaches only requirements regarding potentially fraudulent or deceptive materials provided with the animal product by the producer or distributor. *See Am. Meat Inst. v. Ball*, 424 F. Supp. 758, 764 (W.D. Mich. 1976) (holding that placards required by Michigan law to notify consumers when meat did not meet Michigan standards was not "labeling" within the meaning of the FMIA and thus the Michigan law was not preempted). For example, the Congressional Statement of Findings demonstrates that the primary concern of FMIA is protecting consumers from unsafe meat:

> It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products . . . are injurious to the public welfare . . . and result in . . . injury to consumers.

21 U.S.C.A. § 602 (2006).

Cases examining the FMIA uniformly support this characterization of its purpose. *See, e.g., United States v. Stanko*, 491 F.3d 408, 416 (8th Cir. 2007) (noting that "the FMIA's primary . . . purpose [is] protecting consumers from unsafe meat"); *Nat'l Pork Producers Council v. Bergland*, 631 F.2d 1353, 1361 (8th Cir.1980) (noting that Congress in enacting the FMIA charged the USDA with assuring that meat distributed to consumers is wholesome and not adulterated); *United States v. Mullens*, 583 F.2d 134, 139 (5th Cir.1978) ("The purpose of the Meat Inspection Act of 1907, as amended . . . is to ensure a high level of cleanliness and safety in meat products."); *Fed'n. of Homemakers v. Hardin*, 328 F. Supp. 181, 184 (D.D.C. 1971) ("The primary purpose of the Wholesome Meat Act is to enable [the consumer] to have a correct understanding of and confidence in meat products purchased.").

Furthermore, the legislative history the FMIA supports the conclusion that the term "accompanying" reaches only potentially fraudulent or deceptive materials provided with animal products by the producer or distributor. "[T]he legislative history of the FMIA's preemption provision shows that Congress defined 'labeling' in that provision by adopting the definition of 'labeling' found in the [Food, Drug and Cosmetic Act]" ("FDCA"). *Am. Meat Inst. v. Leeman*, 180 Cal. App. 4th 728, 757 (2009) (citing Sen. Rep. No. 90–799 (1967)). Thus, origin of the term in the FDCA is probative of what Congress intended it to mean in the FMIA.

The original version of the FDCA, the 1906 Food and Drug Act ("FDA"), was intended to protect the public from "illicit articles of commerce." *Ball*, 424 F. Supp. at 765. The labeling provision was meant to prevent misbranding, "the presence of a false label on the article." *Id.* Prior to 1938, this "law protected the public only where false claims were made on the label or package or in a circular within the package." *Ball*, 424 F. Supp. at 766. However, drug manufacturers could easily avoid the jurisdiction of the FDA by separating "physically the printed matter bearing the false claims from the article itself." *Id.* In 1938, the FDCA was enacted in part to eliminate this loophole by expanding the concept of misbranding to include "printed or graphic matter which *accompanies* any article of food or drug." *Id.* (emphasis added). This indicates that Congress adopted this definition of "accompanying" in the FDCA, and hence also the FMIA, with the intent "to protect consumers and to curb misleading information provided by those involved in manufacturing or selling regulated products." *Id.* The legislative history does not reveal "the slightest intent to prohibit a state from communicating information to its citizen-consumers in order to assist them in making informed purchasing decisions[,]" as is the case with the placard required by the APCIA. *See id.* "In fact, the clear thrust of the legislation is in the opposite direction." *Id.*

Indeed, in cases where courts have found that matter accompanying but not attached to the product constituted "labeling" within the meaning of the FMIA (or the FDCA's parallel provision), the relevant matter was generally promotional material originating with the producer or distributor. For example, in *Kordel v. United States*, 335 U.S. 345, 347-48 (1948), the Supreme Court held that false and misleading material regarding the efficacy of drugs that was provided separately by the producer of the drugs constituted "labeling" within the meaning of the FDCA. In *Meaunrit v. ConAgra Foods Inc.*, 2010 WL 2867393, *8 (N.D. Cal. July 20, 2010), the court held that an allegedly misleading in-store advertisement provided by the manufacturer of a product, in the form of a poster not attached to the product, constituted "labeling" within the meaning of the FMIA, and therefore state law claims regarding the advertisement were preempted. Both of these cases thus concern matter readily distinguishable from the placard required by the APCIA, which conveys only information provided by the state itself that has nothing whatsoever to do with the quality of the regulated animal products.

Thus, cases interpreting the FMIA, as well as its declared purpose and legislative history, indicate that, by including "accompanying" matter in the FMIA's definition of "labeling" Congress intended to preempt state requirements regarding information provided by those involved in the manufacture and distribution of animal products, regarding the quality of those products, in order to prevent fraudulent and deceptive practices. *See* 28 U.S.C. § 601(p) (2006). Congress did not intend to preempt state requirements regarding the dissemination of information by states themselves regarding the general effects of eating animal products on consumers' health, or of animal agriculture on the environment and animal welfare, which is the goal of the APCIA. *See* N.Y. Agric. & Mkts. Law § 1000.3. Thus, particularly given the strong

presumption against preemption, the APCIA is not expressly preempted by the FMIA's preemption provision. *See Medtronic*, 518 U.S. at 485.

C. The FMIA Does Not Occupy the Field of Commerce in Animal Products.

In enacting the FMIA, Congress did not intend to occupy the entire field of commerce in animal products. Field preemption applies "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Gade*, 505 U.S. at 98. Several features of the FMIA reveal that Congress intended instead to allow states to supplement it.

First, the language of the FMIA manifests express congressional intent not to occupy the field of commerce in animal products entirely, providing that the FMIA "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." 21 U.S.C. § 678 (2006). Particularly given the strong presumption against preemption, this specific reservation of power for the states alone is enough to demonstrate that Congress did not intend field preemption.

However, the FMIA also contains the narrow inspection and labeling preemption clause discussed above. *See* 28 U.S.C. § 678 (2006). "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517. Thus, the presence of this express preemption clause demonstrates that Congress did not intend to preempt matters beyond its scope, and therefore did not intend to occupy the entire field of commerce in animal products.

Finally, the FMIA's title refers "specifically to meat *inspection*, rather than a more comprehensive scheme of meat regulation." *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326, 334 (5th Cir. 2007). "The need for uniform meat packaging, inspection

and labeling regulations is strong, lest meat providers be forced to master various separate operating techniques to abide by conflicting state laws." *Id.* There is no similar need for uniformity in the information provided by states at the point of sale regarding the effects of animal product use on health, the environment, and animal welfare. The burden placed upon retailers by requiring display of a placard is minimal. Thus, there is no reason to suspect that Congress intended field preemption in this case.

For these reasons, and given the presumption against preemption, the FMIA does not occupy the field of commerce in animal products. *See id.* (holding that "Congress did not intend to preempt the entire field of meat commerce under the FMIA").

D. The FMIA Doe Not Preempt the APCIA by Conflict.

Finally, there is no conflict between the FMIA and the APCIA, and thus no conflict preemption. Conflict preemption arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Hillsborough Cnty.*, 471 U.S. at 713 (citations omitted). Conflict preemption is a demanding standard, and so courts should not "[seek] out conflicts between state and federal regulation where none clearly exists." *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (citing *Huron Portland Cement Co.*, 362 U.S. at 446).

It is not physically impossible to comply with both the APCIA and the FMIA. In *Grocery Mfrs. of Am., Inc. v. Gerace*, the court held that the FMIA preempted a New York law requiring that the term "imitation" appear on the labels of nutritionally superior cheese because this "would render the product misbranded under federal law" and thus compliance with both the FMIA and the New York law would be impossible. 755 F.2d 993, 1001 (2d Cir. 1985), *aff'd sub*

nom, 474 U.S. 801 (1985). Conversely, complying with the APCIA by displaying the required placard conveys no information about the quality of the regulated animal product and would not violate any provision of the FMIA. In *Armour & Co. v. Ball*, the court held that because compliance with both was impossible, the FMIA preempted a Michigan law that required substantively different meat ingredient standards than federal law. 468 F.2d 76, 84-85 (6th Cir. 1972). The APCIA, however, does not impose any standards requirements at all, it merely supplies information to the public on different subject matter than that regulated by the FMIA. Thus, complying with the APCIA's placard requirement would not prevent any party involved in the manufacture or sale of animal products from complying with the requirements of the FMIA.

Nor does the APCIA stand as an obstacle to achievement of the FMIA's objective of "assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." *See* 21 U.S.C. 602 (2006). In *Empacadora*, the court held that a Texas law prohibiting the use of horsemeat for human consumption did not stand as an obstacle to realizing the objectives of the FMIA because it would not increase "the risk of having adulterated or mislabeled meat reach consumers." 476 F.3d at 334. Similarly, the APCIA's requirement that retailers display information for consumers about the effects of the use of animal products on health, the environment, and animal welfare in no way increases the chance that unwholesome, adulterated, or mislabeled animal products would reach the public. Thus, the FMIA does not preempt the APCIA by conflict.

Consumers have a right to be informed about the nature of the food they ingest, and about the effects the food items they choose to purchase have upon their health, the environment, and other living beings. The APCIA's placard requirement provides valuable information along these lines, and on subjects totally outside of the scope of the FMIA's purpose of protecting the

public from tainted or deceptively labeled meat. Given New York's legitimate interest in protecting its citizens' health, its environment, and in preventing unnecessary suffering of animals, and given the strong presumption against preemption in these matters, the district court did not err in holding that the APCIA is not preempted by the FMIA. (*See* R. at 18.)

II. THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

A. The APCIA Does Not Discriminate Against Interstate Commerce and Therefore the Pike Balancing Test Applies.

The Constitution grants the power to regulate commerce among the states to congress. U.S. Const. art. I, § 8, cl. 3. This grant includes an implicit restraint on the states' ability to regulate commerce themselves, known as the dormant Commerce Clause. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-180 (1995). In *Town of Southold v. Town of East Hampton*, this Court stated that "in analyzing a challenged local law under the dormant Commerce Clause, we first determine whether it clearly discriminates against interstate commerce in favor of intrastate commerce, or whether it regulates evenhandedly with only incidental effects on interstate commerce." 477 F.3d 38, 47 (2d Cir. 2007). As the district court found, the APCIA does not itself discriminate against interstate commerce. (R. at 18:17.) The law requires a placard be placed above all animal products, not just those from out of state, and requires it to be placed by retailers operating within the state, thus requiring nothing of any out of state entities. (R. at 18:18-19.)

For the purposes of the dormant Commerce Clause, a law which is not on its face discriminatory could still warrant heightened scrutiny if its purpose or effect evidence a protectionist motive. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir. 2003). If a regulation evinces a discriminatory purpose, or unambiguously discriminates in its effect, it almost always is "invalid per se." *Id.* As the district court found, the purpose of the

APCIA is not a protectionist one. (R. at 19:24-20:5.) The purpose of the act is to "protect the citizens of this state by providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively affects health, the environment, and imposes unnecessary suffering on animals." N.Y. Agric. & Mkts. Law § 1000.3. This stated motive is not one of economic protectionism.

The history of the APCIA's enactment also demonstrates that there was no protectionist motive. (*See* R. at 3:6-3:16.) The APCIA was proposed by a committee convened to look into ways to reduce costs, and was enacted after extensive testimony by experts in the areas of health, environmental sustainability, and animal suffering. *Id.* The record does not evidence any discussion of the benefits the APCIA could have for local business and instead demonstrates that the legislature was focused on reducing costs and animal suffering. *Id.*

The effect of the statute also does not evidence a protectionist purpose. Here, the question is not whether the effects the APCIA may have on interstate commerce are warranted on balance, but whether they evidence a discriminatory purpose. *See Pataki*, 320 F.3d at 209. In *Pataki*, this Court upheld a state law forbidding most delivery of cigarettes through the mail. *Id*. at 217. While this had the effect of eliminating virtually all out of state businesses from participating in the cigarette home delivery industry, the court found this advantage de minimis and insufficient to establish a discriminatory effect. *Id.*

The hypothetical effect the APCIA could have on interstate commerce is equally de minimis. The theory that someone intending to purchase animal products would not purchase them after reading the placard, visit the state-sponsored website and find the list of New York Farms, still decide to purchase animal products despite the horrendous negative effects the website warns them of, and then decide to only purchase from the farms on the website

regardless of their cost in relation to comparable out of state products, is far too attenuated to evidence a discriminatory purpose.

Even if the APCIA's effect did cause some consumers to purchase from in-state sustainable farms instead of from out of state farms, this does not evidence discrimination. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978). In *Exxon Corp.*, a state law forbade oil refiners from operating their own stations in the state. *Id.* at 121. The law had the effect of excluding refiners, all of whom were out of state companies, from participating in the direct retail market. *Id.* However, it did not forbid them from supplying retailers, nor did it forbid other interstate retailers from operating stations in the state. *Id.*

Similarly, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 458 (1981), a state law forbade the sale of milk in certain plastic containers, but permitted such sale in certain paperboard cartons. The Supreme Court held the Minnesota law nondiscriminatory because it applies equally to all in and out of state producers of milk, even though there are no plastic producers in state and paperboard production is a major state industry. *Id*. at 473.

Exxon Corp. and *Clover Leaf Creamery Co.* demonstrate that when a law has the effect of shifting interstate commerce from one type to another, it does not constitute discrimination and does not warrant heightened scrutiny. 437 U.S. at 126; 449 U.S. at 473. The APCIA could have the effect of shifting interstate commerce in CAFO-produced animal products to more humane and environmentally sustainable animal products. It could also have the effect of causing an increase in the interstate trade in products that cater to vegans and other non-meat eaters, such as vegetables, non-animal proteins, and vitamin b12 supplements. If the APCIA has

its intended effect of reducing the consumption of animal products, it could prove a boon to these industries, and increase interstate commerce in them overall.

The district court held not that the purpose or effect of the APCIA demonstrate a discriminatory motive, but that the APCIA explicitly and impermissibly distinguishes between interstate and intrastate commerce, by including only New York farms on its website. (R. at 19:16.) Listing the farms does not "advocate the purchase of instate goods over out of state goods", as the district court held. *Id.* The website provides information about the practices that take place on farms. (R. at 19:8-19:9). The list of nearby farms serves as an example of these practices. The website encourages people to conduct their own research, so providing a list of nearby farms that employ some of these practices assists consumers who wish to visit such farms and see the practices themselves. The website is not a shopping list and does not advocate purchases from these farms.

Viewing the website as a whole, it is abundantly clear that it does not discriminate against interstate commerce. (R. at 4:1-4:8.) The website provides information about the negative effects of all animal products, not just those from out of state. *Id.* The information provided is approved by the experts who testified before the committee, all of whom focus on the health effects of animal products and animal agriculture, with no distinction made between New York and non-New York farms. (*See* R. at 5:3-5:19, 6:4-6:14, 7:1-8:9; 8:11-8:15; Rollin Aff.)

The APCIA does not require that only New York farms be listed on the website, nor does the website indicate that the value of these farms is in any way related to their status as New York farms. *See* N.Y. Agric. & Mkts. Law § 1000.3. It also does not list every farm in New York, but only the ones that employ certain welfare and environmental practices. (R. at 4:5-4:6.) It does not even purport to be a complete list of such New York farms. *Id.* The mere fact that

these farms are located in New York does not mean that they are not operated or supplied by out of state businesses, thus making an already minimal potential effect on interstate commerce truly de minimis. No average consumer would reasonably believe that the only farms in the country that have sustainable and humane animal practices are all in New York. Instead, consumers will see the website as it is, a list of nearby farms which the state has inspected. *See id.* The website does not claim that no other farms could have the same practices and no reasonable consumer would assume such a proposition.

Cases found to facially discriminate against interstate commerce involve state laws that require or forbid various actions in relation to out of state businesses, while the APCIA does neither. *See, e.g.*, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519-28 (1935) (invalidating New York law forbidding sale of milk bought outside of the state unless the out of state producer was paid a price equal or higher than that required for in state producers); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 568-95 (1997) (invalidating Maine law requiring non-profit organizations that serve principally out of state clientele pay a higher tax rate than those serving Maine residents). The APCIA does not ban, prohibit, or otherwise regulate the interstate trade in animal food products. N.Y. Agric. & Mkts. Law § 1000.3. These products can still move freely across state lines into and out of New York, and neither the APCIA nor the website make a facial distinction between interstate and intrastate commerce. *Id.* Thus, the APCIA does not facially discriminate against interstate commerce.

B. <u>The Benefits of the APCIA Outweigh any Speculative Burden it May Have on Interstate Commerce.</u>

Because the New York law does not discriminate against interstate commerce, it is presumed constitutional. *See Pike*, 397 U.S. at 142. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only

incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* The burdens imposed by the APCIA on interstate commerce are minimal and the APCIA furthers legitimate state interests in protecting the health and environmental safety of New York residents, reducing animal suffering, and disseminating information about the potential health effects of food. *See, e.g.*, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976) (finding protection of environment is legitimate state interest); *United States v. Stevens*, 130 S. Ct. 1577, 1600 (2010) (finding prevention of animal suffering is a compelling government interest); *Gerace*, 755 F.2d at 1003, *aff'd sub nom*, 474 U.S. 801 (1985) (finding informing consumers about food is legitimate state interest).

In *Gerace*, this Court held, and the Supreme Court affirmed, that a New York law requiring food establishments to display a placard listing which items contain imitation cheese did not violate the dormant Commerce Clause. 755 F.2d at 997. The Court found that this posed a relatively minor burden on commerce and advanced an important state interest in informing consumers about the contents of their food. *Id*. at 1005. This interest was motivated by a concern for the potential health effects of eating imitation cheese. *Id*. at 1003. These potential health effects were controversial, but the court found that the "very existence of this controversy persuades us that New York's nutritional concerns are not unreasonable." *Id.* at 1005.

Similarly, the APCIA requires the display of a placard conveying information related to food and health in order to further New York's legitimate interest in its citizens' health. The negative health effects of eating animal products are well documented. (R. at 19:24-19:25.) Doctor T. Collin Campbell PhD, a certified expert in the field of nutrition, testified unequivocally that "[t]here is nothing better the government could do that would prevent more pain and suffering in this country than telling Americans unequivocally to eat less animal

products . . . cigarettes kill and so do these bad foods." (R. at 5:3-5:8.) Doctor Michael Greger, a court certified expert in public health and nutrition, warned of the catastrophic consequences of antibiotic resistant zoonotic diseases spread by farm practices. (R. at 6:15-8:9.) "Even relatively small intakes of animal-based food [are] associated with adverse effects." (R. at 5:9-5:10.) Such dramatic and life-threatening effects certainly warrant state action. *See Gerace*, 755 F.2d at 1004. Providing information to consumers to help them make informed food choices is a way to effectuate this interest and is a legitimate state interest in itself. *Ball*, 424 F. Supp. at 761-62.

In *Gerace*, this Court held that the mere existence of a controversy concerning the health effects of imitation cheese was a strong enough legitimate state interest to warrant the posting of a placard notice where it is served. 755 F.2d at 1004. The APCIA, however, furthers a state health interest which is supported by substantial evidence and research, not mere controversy.

Beyond health, the APCIA furthers an interest in protecting the environment, also a legitimate state interest. *See Hughes*, 426 U.S. at 809. For New York, reducing the effects of animal agriculture on the environment is not only legitimate, but critically important. According to an estimate by the Union of Concerned Scientists, environmental clean-up of animal agricultural pollution could cost New York 4.1 billion dollars. (R. at 9:6-9:9.)

Finally, the APCIA furthers an interest in protecting animals, also a legitimate state interest. *See, e.g.*, *Stevens*, 130 S. Ct. at 1600; *DeHart*, 39 F.3d at 722 (citing *Nicchia*, 254 U.S. at 230–31; *Safarets Inc. v. Gannett Co., Inc.*, 361 N.Y.S.2d 276, 280 (1974); *Humane Soc. of Rochester & Monroe Cnty. for Prevention of Cruelty To Animals, Inc. v. Lyng*, 633 F. Supp. 480, 486 (W.D.N.Y. 1986); *Farm Sanctuary, Inc. v. Dep't of Food & Agric.*, 63 Cal. App. 4th 495, 504 (1998). The pain and suffering associated with production of meat products is well-documented. (*See generally* Rollin Aff.) There are efforts in many states to prevent such

information from reaching the public, making the APCIA even more important from a consumer education perspective. (*See* R. at 17:19-17:22.) Thus, the APCIA provides great benefit to New York by furthering several legitimate state interests.

On the other hand, the burden placed upon interstate commerce by the APCIA is slight. In *Gerace*, this Court found the burden placed on commerce by the imitation cheese placard requirement relatively minor compared to the state interest in providing health information. 755 F.2d at 1005. "Any advantage the dairy industry might see from the law would be gained by the industry as a whole, and not limited to industry in New York." *Id.* at 1004. The effect of the APCIA is similarly minor and evenly spread. While some industries might see a reduction, such as those involved in producing animal products in CAFOs, other industries will see a rise, such as vegetable, grain, and other non-animal food products. The effect of the APCIA on more humane and environmentally sustainable farms will likely also be spread between interstate and intrastate commerce. While it is possible that some New York farms may see slight benefit from being listed on the website, an incidental effect on interstate commerce is tolerable in light of the important state interest. *See Pike*, 397 U.S. at 142. It is not necessary that there be zero effect on interstate commerce for a state law to be valid under the dormant Commerce Clause. *Id.*

In *Ball*, the court invalidated a Michigan law which required retailers to post a placard stating "[t]he following products do not meet Michigan's high meat ingredient standards but do meet lower federal standards," followed by a list of such products. 424 F. Supp. at 763. The court found Michigan's interest in providing information to consumers to help them make healthy food choices to be legitimate. *Id.* at 288. However, Michigan's law failed *Pike* balancing because the characterization of its standards as higher was inaccurate. *Id.* at 289. Additionally, the court noted that the placard did not "encourage the customer to discover the

exact differences between the Michigan and federal standards" but instead encourages "the opposite action by creating the misimpression that Michigan products are better in all respects." *Id.*

The APCIA, on the other hand, explicitly encourages consumers to conduct additional research beyond that found on the placard. (R. at 22:18-22:21.) The information on the placard is correct, unlike that found on the Michigan placard, and is supported by extensive research and legislative findings. (*See* R. at 5:20-5:22, 6:18-6:21, 7:22-23 (negative health effects); R. at 10:1-10:18, 10:5-10:14, 10:22-10:23 (negative environmental effects)); Rollin Aff. (animal suffering)). The APCIA also requires the placard be placed above all animal products, unlike the Michigan placard which only listed animal products from out of state. *See* N.Y. Agric. & Mkts. Law § 1000.3. The website discusses the negative effects of all animal products and while it only lists New York farms as examples of those with lower environmental and animal welfare effects, overall it benefits all farms of this type by highlighting the problems with CAFOs.

As noted, under the *Pike* test, the presumption is in favor of validity. *Pike*, 397 U.S. at 142. Only when the state law appears to do virtually nothing in pursuance of the state interest is the law held not reasonably well adapted to effectuate the state purpose. *See S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 781-82 (1945). Even a small potential benefit from the statute is sufficient to tip the balancing test in favor of validity when the effect on interstate commerce is de minimis. *See Pataki*, 320 F.3d at 217. In *Pataki*, a law forbidding the delivery of cigarettes through the mail was held valid under the dormant Commerce Clause based on the state purpose of preventing sale of cigarettes to minors, even though only 1.9% of cigarette sales to minors happened through the mail. *Id.* The court found the effect on interstate commerce to

be de minimis, even though it effectively closed the market of cigarette home delivery to retailers without physical stores in New York. *Id.*

The APCIA has an even smaller potential effect on interstate commerce than the one upheld in *Pataki* because it does not forbid any sales at all. *See* N.Y. Agric. & Mkts. Law § 1000.3. It is merely informational, leaving it to consumers themselves to decide what to purchase. Even if the APCIA did cause a major reduction in the consumption of animal products as the New York legislature intends, these effects will be felt by the animal products industry both in and out of New York, thus not burdening interstate commerce. When a state law has the effect of shifting interstate commerce in one industry to another, in this case between trade in conventionally produced animal products to vegan products, it does not discriminate against interstate commerce. *Exxon Corp.*, 437 U.S. at 126; *Clover Leaf Creamery Co.*, 449 U.S. at 473.

Thus, the APCIA survives *Pike* balancing. The ACPIA furthers legitimate state interests in informing consumers about the effects of choosing to consume animal products. The required placard and the website do this by providing research and factual information, as well as information about nearby farms with practices that are less destructive. For the reasons described above, any burden placed on interstate commerce is incidental and is outweighed by the benefits the APCIA provides to New York.

C. Even if the APCIA Is Found to be Discriminatory, it Survives Strict Scrutiny Because it is the Least Restrictive Way to Achieve a Critically Important State Interest.

The district court determined that the existence of a list of New York farms on the website mentioned in the placard constituted discrimination against interstate commerce and therefor subjected the APCIA to heightened scrutiny. (R. at 20:10-20:16.) As described in Part II, Section A, with no evidence of a discriminatory purpose, the minimal potential discriminatory

effect, and the lack of any language in the statute or on the website advocating for the purchase from New York farms or indicating that only New York farms employ more humane and sustainable practices, the mere list of farms does not constitute discrimination against interstate commerce, and therefore heightened scrutiny should not apply.

However, the APCIA survives a dormant Commerce Clause challenge even under the heightened scrutiny called for by the district court. When a state law "discriminates against interstate commerce either on its face or in practical effect, the State must show both that the statute serves a legitimate local purpose, and that this purpose cannot be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). As described in Part II, Section B, the APCIA furthers several legitimate state interests. The district court found these to be not only legitimate, but *important* state interests. (R. at 20:10-20:11.)

The APCIA is the least discriminatory way to effectuate New York's legitimate, and in this case important, interests. As discussed above in Part II, Section B, the effect of the APCIA on interstate commerce is de minimis. It provides no real benefit to the New York farms listed on the website because it is unlikely that consumers will even visit the website and if they do, they certainly will not assume that the only sustainable farms in the country are all located in New York. Furthermore, the statute is designed to discourage the consumption of animal products, not encourage the consumption of the "sustainable" animal products offered by the New York farms listed on the website. (R. at 3:14-3:16.) The APCIA will likely have the effect of reducing consumption of animal products in general, including those produced sustainably. This is because many of the most negative health effects discussed on the website come from consuming animal products generally, and even more "humane" animal practices still involve animal suffering and death. (*See* R. at 5:3-5:8; Rollin Aff.)

Of course, there are many ways to effectuate the purposes of the APCIA, and so determining which one is the least discriminatory is a dubious undertaking. The district court suggests that other legislation would effectuate the purpose of the APCIA without burdening interstate commerce, but does not include any suggestions for what that legislation would look like. (R. at 20:25-21:1.) The New York legislature heard over a thousand hours of testimony on how to effectuate these purposes and chose the APCIA. (R. at 3:11.) As this Court stated, "'The disputed provisions here are the result of legislative choices.'" *Gerace*, 755 F.2d at 1005 (quoting *Exxon Corp.*, 437 U.S. at 128). "The arguments against the provisions [relate] to the wisdom of the statute, not to its burden on commerce." *Gerace*, 755 F.2d at 1005. "That wisdom is better reconsidered in Albany than Foley Square." *Id.*

This point is well taken. There are many ways to effectuate the APCIA's purpose and it is up to the legislature to decide which one works the best. *See id.* However, the Court must consider whether the burden the legislative choice places on interstate commerce is necessary. *Maine*, 477 U.S. at 138. The district court suggested placing the names of out of state farms on the website to eliminate the discriminatory effect. (R. at 20:13-20:14.) It is unclear how many farms would need to be listed from out of state before the website no longer allegedly appears to discriminate against interstate commerce. Listing one farm from Massachusetts on the website would negate the argument that only New York farms are listed, but this would likely confuse consumers into thinking the website provides a complete list of farms which have humane and environmentally sound practices. Providing such a list is not the purpose of including the farms on the website, and therefore would not effectuate the legislative purpose. The district court also suggested that not listing any farms would be the least discriminatory way to effectuate the statutory purpose. (R. at 20:2-20:23.) This ignores the purpose of listing farms on the website.

The purpose of listing farms on the website is not to provide consumers with a shopping list, but to encourage residents to conduct their own research into farm practices. *See* N.Y. Agric. & Mkts. Law § 1000.3. By stating which nearby farms employ certain methods, the website provides examples of the methods in practice.

In evaluating the means adopted by the legislature, it is important to remember that "[N]ot every exercise of state authority imposing some burden on the free flow of commerce is invalid." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 349 (1977). Strict scrutiny is still a balancing test, so some incidental effects on interstate commerce are tolerated when the state interest served by the law are sufficiently important. *Maine*, 477 U.S. at 142. In *Maine*, the Supreme Court held a Maine law forbidding the import of baitfish to be the least discriminatory way to effectuate the legitimate state interest of protecting local fish species from foreign parasites. *Id.* The Court found the statute to be a legitimate exercise of state power despite the fact that the science underlying the statute was speculative. *Id*. at 148. The APCIA is a response to a much more complicated problem than the spread of a foreign parasite that can only enter state waterways through the importation of baitfish. The New York legislature chose a way that does not prohibit, forbid, or otherwise interfere with interstate commerce. Any effects it may have on such commerce are de minimis and need not be completely eliminated. Thus, even should the APCIA be subjected to strict scrutiny, it survives.

D. <u>The List of Local Farms on the Website can be Viewed as a State Expenditure Exempt from Scrutiny Under the Dormant Commerce Clause.</u>

The Supreme Court has long held that when a state acts as a market participant, rather than as a regulator, it is exempt from dormant Commerce Clause challenge and is free to favor its own citizens over those of other states. *Hughes*, 426 US at 810. The APCIA should be so exempt, because the inclusion of New York farms on the website could be seen as an incident of

New York entering the market and providing free advertising to its citizens. Though there are no other dormant Commerce Clause cases in which a state has provided free advertising to local businesses, this could be because such actions are not contemplated by the Commerce Clause.

In *Hughes*, a Maryland law required out of state sellers of automobile hulks to complete more onerous paperwork in order to sell to the state than Maryland residents did. *Id.* at 806. In holding that the law was exempt from Commerce Clause analysis based on the market participant exception, the Court stated that"[t]he common thread of all [commerce clause] cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Id*. Here, the APCIA does not interfere with the natural functioning of the interstate market though prohibition or regulatory measures. N.Y. Agric. & Mkts. Law § 1000.3. Maryland did not seek to "prohibit the flow of hulks, or to regulate the conditions under which it may occur," and New York does not seek to prohibit the flow of more sustainable and humanely raised animal products into the state or regulate the conditions under which it may occur. *Id.*

The state was free in *Hughes* to spend money from its general funds to favor its own citizens, and New York is equally free to spend money from its general funds to maintain a website favoring New York farms. *Id.* at 809. What was true of the Maryland statute is true of the website under the APCIA, "no trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes [product] movement out of State." *Id.* at 809-10.

The website does not stand alone, but is part of the APCIA, which does include regulation, specifically the placement of placards. However, as the Court recently stated in *Dep't of Revenue of Kentucky. v. Davis*, "In each of these [market participant exception] cases the commercial activities by the governments and their regulatory efforts complemented each

other in some way, and in each of them the fact of tying the regulation to the public object of the foray into the market was understood to give the regulation a civic objective different from the discrimination traditionally held to be unlawful." 553 U.S. 328, 347 (2008). States act predominantly though regulation, and the Court recognizes that even when acting as a market participant, there is an element of regulation inherent in state action. *Id.* This is not equivalent to regulation of interstate commerce, and does not prevent a state action from being a valid exercise of the market participant exception. *Id.*

In *West Lynn Creamery, Inc. v. Healy*, the Court invalidated a pricing order which provided a subsidy to all local dairy farmers because it was funded by an assessment charged to all milk producers, most of which were from out of state. 512 U.S. 186, 199 (1994). The Court emphasized that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business" and only held the pricing order unconstitutional because it taxed principally out of state producers. *Id.* Listing New York farms on the website can be similarly viewed as an advertising subsidy which assists local businesses, but does so without charging or otherwise regulating interstate commerce.

CONCLUSION

The purpose of the APCIA is to protect human and environmental health, and reduce animal suffering by providing information to about the consequences of consuming animal products. This is a purpose wholly separate and complimentary to that of the FMIA. The state interests protected by the APCIA are critically important, and the APCIA serves them with a de minimis incidental effect on interstate commerce. Because the APCIA does not violate the Supremacy nor the Commerce Clause, the district court's order granting NMPA's motion for summary judgment should be reversed.