Case No. CV 11-55440 NCA (ABCx)

United States Court of Appeals
For the Second Circuit

NATIONAL MEAT PRODUCERS ASSOCIATION,

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

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

BRIEF FOR PLAINTIFF-APPELLE

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II. Does the Animal Products Consumer Information Act exceed Congressional authority under the Commerce Clause of the United States Constitution?

STATEMENT OF THE CASE

I. Nature of the Case

This case involves a constitutional challenge to a New York statute attempting to regulate the sale of beef and pork products, and whether it is violative of both the Commerce Clause and the Supremacy Clauses of the United States Constitution.

II. Course of Proceedings and Disposition in the Court Below

The National Meat Producers Association (NMPA), a national trade association of meat producers, filed an action in the United States District Court for the Southern District of New York claiming the Animal Products Consumer Information Act (APCIA), N.Y. AGRIC. & MKTS. Law § 1000 (2010), is unconstitutional. The NMPA asserted the APCIA violates the Commerce Clause of the United States Constitution, and the Supremacy Clause of the United States Constitution. The NMPA filed a motion for summary judgment based on the above assertions seeking declaratory and injunctive relief in accordance with Fed. R. Civ. Pro. 56. Following consideration of the NMPA's motion and the Defendants' reply, the court granted summary judgment in favor of the NMPA. The court held the APCIA violated the Commerce Clause and is therefore unconstitutional. The court also found the labeling requirement of the APCIA constituted labeling as defined by the FMIA, but by misapplication of the law, found the APCIA was not preempted by the FMIA. Defendants appealed the district court's Order.

III. Statement of Facts

The Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 601-678 (2006), was originally enacted in 1906 and over the last century has undergone several amendments, many of which are relevant here. The FMIA includes a preemption clause at Section 678 that states, "[m]arking, 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 v. Comm'r N.Y. State Dep't of Agric. & Mkts.*, No. CV 11-55440 NCA (ABC), slip op. at 2 ll. 15-17 (S.D.N.Y. Sept. 15, 2012). Section 601(p) states, "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*. at 2 ll. 17-19.

In response to the significant financial problems and the lack of available funds, faced by the State of New York, the legislature directed several congressional committees to address the budget shortfall by coming up with ideas to reduce state costs. *Nat'l Meat Producers Ass'n*, No. CV 11-55440 NCA (ABC), slip op. at 3 ll. 6-7 (S.D.N.Y. Sept. 15, 2012). One committee was required to explore all possible actions the legislature could take to reduce long-term government costs without facing any substantial reduction in state benefits *Id.* at 3 ll. 8-9. The committee was designated "The Long-Term Reduction of Government Costs Without Cutting Benefits Committee." *Id*.

This committee along with its included subcommittees heard over 1,000 hours of expert testimony. *Id.* at 3 ll. 10-11. The committee focused on health care and the environment. *Id.* at 3 ll. 11-12. The committee ultimately recommended in excess of 500 different cost-savings measures. *Id.* Of the over 500 recommended measures, only twenty included recommendations related to the animal agriculture industry. *Id.* at 3 l. 13. Of those twenty, all were

recommendations for greater regulations on the animal agriculture industry. *Id.* One recommendation made by "The Long Term Reduction of Government Costs Without Cutting Benefits Committee" was to "encourage the reduction of the public's consumption of animal products" to reduce health care and environmental costs to the state and help address the budget constraints. *Id*. at 3 ll. 15-16. This was determined from the over 1,000 hours of expert testimony presented. *Id*.

Because the legislature expected widespread regulation of the industrial farm animal industry to take time to implement, it passed the Animal Products Consumer Information Act (APCIA), N.Y. AGRIC. & MKTS. Law § 1000 (2010), based on the recommendation of the committee. *Id.* at 3 ll. 13-14. Once enacted, the APCIA's statement of purpose included no discussion of costs savings and instead stated at Section 3 the purpose of the Act was 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." *Id.* at 3 ll. 2-5. Section 4.1 of the APCIA requires all retailers to include a placard anywhere animal products intended for human consumption are offered for sale 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 ll. 6-12. Section 4.2 states the placard "shall consist of a sign not less than 18 by 24 inches and printed in letters not less than 1 ½ inches high." The legislature also heard some testimony concerning the cruelty to animals in large-scale animal agriculture and decided the

humane treatment of animals was an important public interest. *Id*. at 3 ll. 22-26. The legislature then added the "animal suffering" language to the placard. *Id*.

The state sponsored website, www.informedchoice.ny.gov, referenced on the placard and in the New York statute's language, provides a list of farms approved by the State of New York but only includes farms located within the State of New York. *Id*. at 4 ll. 4-8. The website also offers information on the health effects of consuming meat, and the impact of animal agriculture, on animal suffering. *Id.* at 4 ll. 1-5. Many of the medical and environmental experts who spent so much time testifying before "The Long-Term Reduction of Government Costs Without Cutting Benefits Committee" and during the legislative hearings on the APCIA agreed to submit affidavits in support of the State of New York's reply to plaintiff's motion for summary judgment. *Id.* at 4 ll. 9-12.

IV. Standard of Review

The standard of review on appeal from a lower court's grant of summary judgment is de novo. *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 763 (2d Cir. 2002). On a motion for summary judgment, all factual inferences must be drawn in favor of the non-moving party. *Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc.*, 192 F.3d 337, 343 (2d Cir.1999). Summary judgment is appropriate only if the moving party shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

SUMMARY OF THE ARGUMENT

The district court correctly ruled the APCIA violates the Commerce Clause because it is discriminatory both in effect and in purpose, and it imposes an unreasonable burden on interstate commerce that is excessive in relation to the purported state interest, and could be accomplished through non-discriminatory alternatives.

As to the Supremacy Clause issue, the district court correctly determined the APCIA's labeling requirement constituted labeling as defined in the FMIA. 21 U.S.C. § 607(p) (2006). The court, however, then misapplied the law by finding the APCIA did not violate the Supremacy Clause. The FMIA includes an express preemption provision which disallows the APCIA from requiring labeling that is "in addition to or different than" the labeling requirements outlined in the FMIA, 21 U.S.C. § 678. The APCIA violates the preemption clause and is therefore expressly preempted by the FMIA. The APCIA also purports to regulate information "accompanying the sale of all animal products," *Nat'l Meat Producers Ass'n v. Comm'r N.Y. State Dep't of Agric. & Mkts.*, CV 11-55440 NCA (ABC), slip op at 1 n. 1 (S.D.N.Y. Sept. 15, 2012), thereby impermissibly attempting to regulate an area already occupied by the federal government. The APCIA also contains specific labeling requirements which conflict with the authority vested in the FMIA's enforcing agency and the FMIA's labeling requirements, and therefore is preempted. For these reasons, the district court's order granting summary judgment in favor of the NMPA should be affirmed; its finding on the NMPA's preemption claim should be reversed; and, an order finding the APCIA violates both the Commerce and Supremacy Clauses of the United States Constitution should be granted.

ARGUMENT

I. THE ANIMAL PRODUCTS CONSUMER INFORMATION ACT EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE AND SHOULD THEREFORE BE INVALIDATED.

The Commerce Clause gives Congress the Power to regulate Commerce with foreign Nations, and among the several states. U.S. CONST. art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Commerce Clause has long been understood to have a

"negative" aspect that denies states the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Env't Quality*, 511 U.S. 93, 98 (1994). The police powers of the states grant authority to the states to regulate matters of 'legitimate local concern,' even when interstate commerce may be affected, *Maine v. Taylor*, 447 U.S. 131, 138 (1986), however, state laws cannot erect an economic barrier protecting a local industry against competition from without the state, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. *Dean Milk Co. v. Madison,* 340 U.S. 349, 354 (1951).

The Court distinguishes between state statutes that incidentally burden interstate commerce and those that affirmatively discriminate against interstate commerce either on its face or in practical effect. *Taylor*, 447 U.S. at 138 (1986). The Court is not bound by "the name, description, or characterization given it by the legislature or the courts of the state, but will determine for itself the practical impact of the law. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

A. THE APCIA IS DISCRIMINATORY BECAUSE OF ITS SUBSTANTIAL DISCRIMINATORY IMPACT ON OUT-OF-STATERS AND ITS DISCRIMINATORY PROTECTIONIST PURPOSE.

A state law is discriminatory against interstate commerce if it mandates differential treatment either on its face, in its purpose, or in its effect on in-state and out-of state economic interests that benefit the former and burden the later. *Granholm v. Heald*, 544 U.S. 460, 472 (2005). A law is most likely discriminatory if the Court believes the law is motivated by a protectionist purpose. *Hood & Sons v. DuMond,* 336 U.S. 525, 538. (1949).

The burden falls on the state to justify the law 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. *Chem. Waste Mgmt., Inc., v. Hunt,* 504 U.S. 334, 342 (1992). "The state may not use its powers to protect the health and safety of its people as a basis for suppressing competition." *Hood,* 336 U.S. at 538. A discriminatory law must be justified by a purpose "unrelated to economic protectionism," to survive invalidation under the Commerce Clause. *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Resources*, 504 U.S. 353 (1992). "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity,'" *Granholm*, 544 U.S. at 476.

In *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333 (1977), the Court held a facially neutral state law was discriminatory based on the disparate impact of the law against out-of-staters. In that case, the statute required apples shipped into or sold in North Carolina to display either the USDA grade or none at all. *Id* at 336. The law had a discriminatory impact on the interstate sale of Washington apples because the statute shielded the North Carolina apple industry from the competition of Washington growers and dealers. *Id* at 351. Similarly, in *C&A Carbone, Inc. v. Clarkston, N.Y.*, 511 U.S. 383 (1994), the Court found a discriminatory impact in a facially neutral ordinance, which required all solid waste processed or handled within the town to be processed or handled at the town's transfer station, because the protectionist effect of the ordinance, "squelch[ed] competition in the waste-processing service." *Id* at 391.

In *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, 1003-05 (2d Cir. 1985) aff'd sub nom. *Gerace v. Grocery Mfrs. of Am., Inc.*, 474 U.S. 801 (1985), the court found the statute non-discriminatory because, to the extent that the statute indirectly advantaged the dairy industry, the effect was not necessarily limited to in-state dairy producers. *Id* at 1003. The court further held

the local interest of promoting health and nutrition, as well as protecting consumers from false labeling, which the New York statute was designed to protect, was legitimate. *Id* at 1004. The court determined this based on the existence of a controversy among professionals in disagreement over the intrinsic value of the federal nutritional guidelines as applied to alternative cheese products. *Id*. This highlighted the purpose of, at the very least, informing consumers about whether their cheese was real or imitation. *Id*. The court held the statutory provisions effectuated a legitimate, local public purpose. *Id.*

The Court in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), held a statute must be analyzed in full to determine whether a statute unconstitutionally discriminates against interstate commerce. In that case, a Massachusetts' pricing order imposed an assessment on all milk sold to Massachusetts' retailers, two thirds of which was produced outside the state. *Id* at 188. The fund created by the assessment was then distributed to dairy farms located in Massachusetts. *Id*. The Court held, although the tax by itself was nondiscriminatory, the combination of the tax and the subsidy discriminated in favor of local producers was therefore discriminatory. *Id* at 200-202.

The Court in *Lynn Creamery*, 512 U.S. at 205, held the law was discriminatory because the purported state interest of saving a financially distressed industry is exactly the economic protectionism the Commerce Clause prohibits. Similarly, in *Hughes*, 441 U.S. at 337, an Oklahoma state statute which prohibited the exportation of natural minnows for sale outside of Oklahoma, but imposed no limit on the number of minnows taken or disposed of within the state was invalidated because economic protectionism was the purpose of the statute not furtherance of the purported local interest in conservation, *Id* at 338.

But see *Taylor*, 477 U.S. 131, where the Court upheld a discriminatory law which denied access to a state's market because "Maine's ban on the importation of live baitfish serve[d] legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives." *Id* at 151. In that case, the Court identified Maine's objective as protecting a resource and not as economically helping the baitfish industry. *Id*.

In the present case, although the APCIA appears facially neutral, it has a discriminatory impact on out-of-staters because the listed website promotes only meat from within the state. Unlike the statute in *Gerace*, which treats in and out-of-staters alike, the statute here has the purpose of promoting in-state farms. Further, while both the statute in *Gerace* and the statute here have impacts on the associated industry, the impact from the statute in *Gerace* applies to in and out-of-staters similarly, whereas the impact from the statute here only benefits in-staters.

The argument that the law is neutral is further invalidated based on *Lynn Creamery*, because here, as in that case, the entire statute must be taken into consideration. Like the tax in that case, the warning placard required by the APCIA alone may not be discriminatory, but when the warning placard is combined with the information advanced on the website, the law has a disparate impact on out-of-staters similar to the combination of the tax and the assessment at issue in *Lynn Creamery*.

The statute here also has a discriminatory effect, similar to that in *Hunt* and *C&A Carbone*, because the law shields New York farmers from out-of-state competition. Here the effect of the statute is concerned patrons buying meat that comes from the farms listed on the APCIA website, all of which are located within the State of New York. The effect of the promotion of in state products, as was seen in *Hunt* and *C&A Carbone*, is the creation of a meat

monopoly controlled by New York farmers. This impermissibly impedes the interstate flow of commerce, precisely the result forbidden by *Hunt*, *Lynn Creamery*, and *Hughes.*

The protectionist purpose of the APCIA further illustrates the discriminatory effect of the statute. The purpose of reducing state costs, which was the impetus of implementing the statute here, is similar to the protectionist purpose exposed in *Lynn Creamery*. Here, like in *Lynn Creamery,* the overall effect of the statute saves a local interest through protection from interstate competition.

Moreover, the purported purposes of the APCIA, like the statute in *Hughes*, and unlike the statutes in *Taylor* and *Gerace*, are not furthered through the enactement of the statue. Like the false purpose of preventing overexploitation of minnows in *Hughes*, the statute here has a false premise of reducing health related and environmental costs. The APCIA's false premise is exposed here as was the statute in *Hughes* because the APCIA promotes in-state farms similar to the law in *Hughes* which continued to allow in-state sale of minnows.

This is unlike *Taylor*, where the ban on baitfish was for protection of resources not promotion of the baitfish industry, because here unlike there, non-discriminatory alternatives that would further the purported purpose of the statute were available, such as certifying out of state farms or excluding named farms altogether. Further, unlike in *Gerace*, where informing consumers whether they were eating real or imitation cheese was critical information in the desire to expose the health effects of imitation cheese, here, neither the origin of the meat, nor the farming practices have anything to do with the overall health benefits of a meat versus a plant based diet. Also, unlike in *Gerace,* where the statute only relayed information specific to imination cheese, here the statute goes past information to imply New York farms supply better meat than out of state farms. Therefore, the APCIA demonstrates economic protectionism as its

primary state purpose, not the legitimate state purpose proffered by the statute. Thus, the APCIA is discriminatory.

B. EVEN IF THE APCIA IS NEUTRAL IN EFFECT, IT IMPOSES A BURDEN ON INTERSTATE COMMERCE THAT IS EXCESSIVE IN RELATION TO THE PURPORTED STATE INTEREST, AND COULD BE ACCOMPLISHED THROUGH NON-DISCRIMINATORY ALTERNATIVES.

When a state law regulates even-handedly to effectuate a legitimate local public interest, it violates the Commerce Clause and will be found unconstitutional when 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 (1970). If a legitimate local purpose is found, then the question becomes one of degree, and the extent of the burden that will be tolerated will 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* at 142.

In *Armour & Co. v. Ball*, 468 F.2d 76 (1972), the court held the placard at issue did not further any legitimate state interest because it did not provide "useful, accurate, or complete information," and in fact created a misimpression that Michigan products were of a higher quality than those that only complied with federal guidelines. See also, *Dean Milk*, 340 U.S. at 350, 354, where a state law that prohibited the sale of milk not pasteurized within five miles of Madison was invalidated even though it furthered a legitimate public interest because less-discriminatory alternatives were available to accomplished the purported local purpose of health and safety.

The APCIA's promotion of meat from New York farms does not further the purported state interests in protecting the health of the citizens and animal welfare, nor does it reduce the financial burden on the state. Similar to *Armour,* the purpose behind the APCIA's warning placard requirement is not furthered here because limiting meat consumption for health benefits has nothing to do with whether the meat comes from any particular state or farm. Further, as the statute did in *Armour*, the APCIA creates a misrepresentation that in-state meat is of a higher quality and is better for the environment. Moreover, even if animal welfare is a legitimate state interest, there is no reason why only New York farms should be mentioned. The statute here does not further any of the purported legitimate state interests and therefore does not overcome the burden on commerce that results from the preferential treatment of in-state farms over out-of-state farms.

In addition, less discriminatory alternatives are available that could advance the purported interests of the APCIA equally well. Similar to the proposed solutions in *Dean Milk*, the website could promote farms from multiple states certified through inspections or standards created by New York or exclude all farms from the website allowing consumers to research for themselves which farms to support. Therefore, even if the APCIA is non-discriminatory, the purpose of the statute could easily be promoted through less discriminatory alternatives.

The APCIA discriminates against interstate commerce both in impact, by treating out-of-state farms differently from in-state farms, and in purpose, by shielding in-state farms from competition, thus furthering economic protectionism instead of the purported purpose of informing consumers of the health effects of consuming animal products. The APCIA also burdens interstate commerce in excess of the purported state interest when the same purpose could be accomplished through the exclusion of all farms or the inclusion of out-of-state farms

on the website. Therefore, because it is both discriminatory, and creates a burden in excess of the benefits, the APCIA violates the Commerce Clause of the United States Constitution.

II. THE APCIA IS UNCONSTITUTIONAL BECAUSE IT IS PREEMPTED BY THE FMIA AND THEREFORE VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES.

The Supremacy Clause requires that federal law "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. The Constitution expressly grants Congress authority to preempt "any" state law when acting pursuant to its enumerated powers. The Supreme Court determined Congress has sole responsibility for forming preemption policy because its preemption decisions routinely remind us that judicial "inquir[ies] into the scope of a statute's pre-emptive effect [are] guided by the rule that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008) (second alteration in original) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). Therefore, if a state enacts a law that is in conflict with a federal law, the state law is preempted, and is thus, unconstitutional.

The Supreme Court has recognized two major categories of preemption, the first occurs when a federal law expressly preempts state law, and the second occurs when preemption is implied by a clear congressional intent to preempt state or local law. *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88 (1992).

A. THE APCIA IS EXPRESSLY PREEMPTED BY THE FMIA'S PREEMPTION CLAUSE BECAUSE THE APCIA IMPERMISSIBLY REQUIRES AN ACCOMPANYING LABEL IN ADDITION TO THAT REQUIRED BY THE FMIA.

Express preemption occurs when Congress explicitly defines the extent to which its enactments preempt state law. *Shaw*, 463 U.S. 85, 95-98. Preemption, fundamentally, is a question of congressional intent, *see Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988), however, there is "a presumption against supplanting the historic police powers of the states" by federal legislation unless intent to do so "is the clear and manifest purpose of Congress." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996).

When a federal law "contains an express pre-emption clause, [the] 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.' " *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). This "[s]tatutory construction must begin with … the assumption that the ordinary meaning of th[e] [statutory] language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist*., 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). When Congress has made its intent known through explicit statutory language, the court's decision "is an easy one." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). The FMIA preemption clause states, " . . . [L]abeling . . . requirements in addition to, or different than, those made under this chapter may not be imposed by any state. . . ." 21 U.S.C. § 678 (2006).

Under the FMIA "labeling" is defined as, "labels and other written, printed, or graphic matter ... accompanying such article." 21 U.S.C. §601(p). The distinctive characteristic of labeling is that product information "in some manner or another, is presented to the customer in immediate connection with his view and purchase of the product." *United States v. 24 Bottles Sterling Vinegar and Honey Aged in Wood Cider*, 338 F.2d 157, 159 (2d. Cir. 1964). Accompany refers to an article or thing which supplements or explains the item. *Kordel v. United States,* 335 U.S. 345, 350 (1948). No physical attachment between the label and product is necessary. *Id.* The definition of the term "accompanying" within labeling is interpreted broadly. *Id*.

The definition of "labeling" in the FMIA is consistent with the definition of "labeling" in other federal statutes; the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 343 *et seq*. (2006) and the Poultry Products Inspection Act (PPIA), 21 U.S.C. 451 *et seq*. (2006) *Meaunrit v. ConAgra Foods Inc.*, C 09-02220 CRB, 2010 WL 2867393 (N.D. Cal. July 20, 2010), however the FDCA does not include a preemption clause. 21 U.S.C. § 343 *et seq.* (1938). The decision to ensure definitions among statutes remained uniform was "an intentional decision by Congress to preclude states from enacting their own point-of-sale requirements." *Meaunrit*, C 09-02220 CRB, 2010 WL 2867393 (N.D. Cal. July 20, 2010).

Courts have reached differing conclusions as to whether information accompanying products constitutes labeling. In *Kordel,* 335 U.S. 345, the Court held the definition of accompanying under the FDCA was met by pamphlets shipped separately and at different times from the products they referred to. In *Nat'l Meat Producers Ass'n v. Comm'r N.Y. State Dep't of Agric. & Mkts.*, CV 11-55440 NCA (ABC) (S.D.N.Y. Sept. 15, 2012). The district court ruled the APCIA's placard requirement constituted labeling stating, "'accompanying' must mean any

printed material displayed with the intent of conveying information about the product, whether that information is displayed on the product itself, its packaging, or in signs, placards, or posters near the product," and that "[a]ny other definition would render the 'accompanying such article' language meaningless." *Id.* at 12.

In *American Meat Institute v. Ball*, 424 F.Supp. 758 (W.D. Mich. 1976), however, the court found information accompanying the product did not constitute labeling. In that case, the state statute required a notice, which informed consumers that associated products met federal standards but failed to meet the state's higher ingredient standard. The court held the notice at issue was not labeling, relying on the Congressional record and intent of the FDCA. See also, *Gershengorin v. Vienna Beef, Ltd.*, 06 C 6820, 2007 WL 2840476 (N.D. Ill. Sept. 28, 2007) (holding the FMIA does not preempt regulation of signage separate from the marking or labeling on meat packaging itself). But see, *Meaunrit* C 09-02220 CRB, 2010 WL 2867393 (N.D. Cal. July 20, 2010), which found a "cardboard sign" accompanying merchandise regulated by the FMIA constituted "labeling" based on the reasoning from *Kordel,* as the definitions of labeling from the FMIA and the FDCA are identical except that the FMIA contains a preemption clause whereas the FDCA does not.

In the present case, the warning placard clearly meets the definition of labeling as it is "printed material." Further, Section 4 of the APCIA refers to the requirements for the warning placard as "labeling requirement." Therefore, the warning placard is a label as defined by the FMIA.

The warning placard also meets the second part of the FMIA labeling definition as it "accompanies" all meat products at the point of sale. The warning placard here, like the pamphlets in *Kordel*, refers to and explains the meat. This is further evidenced by the fact the

warning placard must always be present where meat is sold within the State of New York. The warning placard here more closely accompanies the meat it refers to than the pamphlets at issue in *Kordel*, because it is presented with the meat, whereas the pamphlet was mailed separately. Because the pamphlets in *Kordel* met the definition of "accompany" so the warning placard here does as well.

The warning placard here may more closely resemble the notice in *Ball* than the pamphlet in *Kordel*, because like the notice in *Ball,* the placard here warns consumers about purported dangers of eating meat. This court should not follow the holding in *Ball,* however, because *Ball*, was decided by looking at the Congressional intent behind the FDCA not the FMIA. Although the definition of labeling is identical in both federal statutes, the FDCA does not contain a preemption clause. Therefore, in *Ball*, there was no intent by Congress to forbid states from additionally regulating labels, whereas here, there is specific intent to forbid state regulation as evidenced by the FMIA preemption clause.

A similar argument against labeling could be made based on the holding in *Gershengorin*, because the sign in that case is arguably similar to the warning placard at issue here. The reasoning from *Meaunrit*, which was nearly identical in issue to *Gershengorin* but held the sign was labeling, is more persuasive, however, because it relied on the United States Supreme Court's interpretation of the FDCA. Moreover, when looking at the plain wording of the preemption clause, as done under statutory construction to determine Congress' intent, the logical conclusion is that the warning placard here accompanies the meat in line with the FMIA.

For these reasons the warning placard here meets the FMIA definition of labeling accompanying such article. The APCIA's warning placard is in addition to that required by the

FMIA and is therefore forbidden by the preemption clause in the FMIA. The APCIA is therefore expressly preempted by the FMIA.

B. EVEN IF THE WARNING PLACARD DOES NOT MEET THE FMIA DEFINITION OF LABELING, THE APCIA IS STILL PREEMPTED BY THE FMIA BECAUSE THE PLACARD ATTEMPTS TO REGULATE A MATTER ALREADY REGULATED BY THE FMIA AND THE LABELING REQUIREMENTS OF THE APCIA CONFLICT WITH THE REQUIREMENTS OF THE FMIA.

Implied preemption can be further divided into implied field preemption, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and implied conflict preemption, *Florida Lime*, 373 U.S. at 142-143. In the absence of explicit statutory language, a state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. *English*, 496 U.S. 72. Such intent may be inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for states to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice*, 331 U.S. at 230.

The Supreme Court will "draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes." *English*, 496 U.S. at 79. When Congress has fully occupied a field of regulation, even non-conflicting state regulation is preempted. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 961 (1984).

Preemption is also found where it is impossible for a private party to comply with both state and federal requirements, *Florida Lime*, 373 U.S. at 142-143, or where state law "stands as

an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

In *Nat'l Meat Ass'n v. Harris*, 132 S.Ct. 965, 967, 181 L.Ed.2d 950, (2012), the Supreme Court unanimously held the FMIA preemption clause was far reaching, and therefore prevented the state from imposing any additional requirements concerning the area regulated by the FMIA. The Court broadly interpreted the FMIA's area of regulation to include ensuring the health and safety of meat and the humane handling of animals during all stages of the slaughterhouse process. *Id* at 968. In addition, the Court held that commercial sale is an extension of slaughterhouse regulation because it ensures the removal of unwholesome meat prior to the point of sale, thus ensuring states do not escape the limitation of the preemption clause by creating laws that address the purchase rather than manufacture of meat. *Id.* Therefore, the court held the state statute was preempted by the FMIA. *See also*, *Armour*, 468 F.2d at 83-86, which stated the intent of Congress was reinforced when Congress later amended the PPIA to add the precise preemptive language included in the FMIA's preemption clause, in response to a New York statute which imposed labeling requirements that were different than those required by the PPIA.

In *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326 (2007), the court found the state statute did not conflict with the FMIA because the statute in that case, which regulated the types of meat that could be sold, did not stand as an obstacle to the FMIA objectives of assuring meat and meat food products distributed to consumers are wholesome, not adulterated and properly labeled and packaged; nor did it alter the risk of having mislabeled meat reach consumers.

In *Grocery Mfrs. Of America, Inc. v. Gerace*, 755 F.2d 993 (1985), this Court held, by imposing requirements for letter size and location of words that differed from the labeling requirements of section 607 of the FMIA, which gives the Secretary the authority to prescribe the style, size ,and type to be used in labeling material, 21 U.S.C. §607 (2006), the New York law conflicted with the FMIA and was therefore preempted. *Gerace*, 755 F.2d 993.

The APCIA is implicitly preempted by the FMIA. The lower court opinion implies the preemption clause of the FMIA is narrow, however, the Supreme Court in *Harris* directly contradicts this premise interpreting the preemption clause of the FMIA as widely sweeping. Congressional intent is further demonstrated in *Armour*'s opinion by the addition of the PPIA preemption clause.

In addition, the lower court held that the FMIA is limited to meat inspection rather than a comprehensive scheme of regulating information on meat, however, this conclusion is again contradicted by *Harris*'s interpretation of the FMIA's scope of regulation including the purported purpose of the APCIA of preventing animal suffering.

It is more likely that the APCIA, like the statute in *Harris*, is a disguised attempt by the state to regulate an area already occupied by the federal government to avoid the preemption clause of the FMIA. Here, as in *Harris*, New York is taking a statute which essentially serves the same purposes as the FMIA, consumer health, safety, and animal welfare, and is attempting to say it deals with information involving the sale of meat not the slaughter of the meat.

Moreover, the requirements imposed by the APCIA conflict with the requirements imposed by the FMIA. The labeling requirements of Section 4 of the APCIA are more like the conflicting requirements in *Gerace*, than the non-conflicting requirements in *Empacadora.* Like in *Gerace*, the APCIA requires specific size, color and background for the letters used in the

warning placard. Also like in *Gerace*, and unlike in *Emparcadora*, these requirements are different than those required by the FMIA. Thereore, like in *Gerace* and unlike in *Emparcadora*, the APCIA conflicts with the FMIA. This conflict makes it impossible to comply with both statutes creating a perfect example of conflict preemption. Because the state statue must yield to the federal statute when there is a conflict, here the APCIA is preempted by the FMIA.

The APCIA is a label, under the FMIA and is therefore expressly forbidden under the preemption clause of the FMIA because it is in addition to labels required by the FMIA. Further, the FMIA preemption clause is "wide sweeping" regulating all areas involving the slaughter of meat, which demonstrates congress' intent to occupy the field therefore preempting the APCIA from imposing additional labeling requirements on the sale of meat. Finally, the APCIA labeling requirements, which dictate the format of the warning placard, conflict with the federal requirements of the FMIA. The APCIA is therefore expressly and implicitly preempted by the FMIA.

CONCLUSION

The APCIA is unconstitutional under both the Commerce Clause and the Supremacy Clause of the United States Constitution. The APCIA discriminates against interstate commerce both in the impact of the statute and in the purpose of the statute. Further, the APCIA imposes a burden on interstate commerce that is in excess of any purported interest advanced by the State of New York. Therefore, the district court was correct in ruling the APCIA violates the Commerce Clause.

The APCIA is also preempted by federal legislation, both because the APCIA imposes labeling requirements, which violate the FMIA preemption clause and conflict with the FMIA

requirements, and because the APCIA attempts to regulate an area already occupied by the FMIA. For these reasons, the district court wrongly decided the Supremacy Clause issue, and the APCIA should instead be invalidated under the Supremacy Clause.

STATEMENT OF RELIEF SOUGHT

Wherefore, the Appellees respectfully request this Honorable Court to affirm the district court's order granting declaratory and injunctive relief and rule the APCIA unconstitutional not only because it violates the Commerce Clause, but also because it is in violation of the Supremacy Clause, and is therefore preempted.

Respectfully Submitted,

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NALC Moot Court Team 5
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