

CASE No. CV 11-55440 NCA (ABCx)

IN THE
United States Court of Appeals
For the Second Circuit

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

v.

NATIONAL MEAT PRODUCERS ASSOCIATION,
APPELLEE

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

BRIEF FOR THE APPELLANTS

Team 7
January 2013

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Animal Products Consumer Information Act preempted by the Federal Meat Inspection Act?
2. Does the Animal Products Consumer Information Act violate the Commerce Clause of the United States Constitution?

STATEMENT OF THE CASE

Preliminary Statement

This appeal is submitted on behalf of the Appellant, The Commissioner, New York State Department of Agriculture and Markets and the New York State Department of Agriculture and Markets. Appellee, the National Meat Producers Association, brought an action for declaratory judgment and injunctive relief claiming that the Animal Products Consumer Information Act, N.Y. Agric. & Mkts. Law §1000 is unconstitutional. The District Court granted Appellee's motion for summary judgment.

The District Court found the magistrate Judge's ruling for summary judgment because the APCIA violates the Commerce Clause of the United States. Appellant appeals this decision.

Statement of Facts

The New York State Department of Agriculture and Markets implemented the Animal Products Consumer Information Act (APCIA), N.Y. Agric. & Mkts. Law §1000. (R. 1). This Act required all retailers selling animal products intended for human use to display a public interest warning sign within their retail location. (R. 2). The sign is required to state:

“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.” (R. 2).

As a way to limit costs, New York State committees made recommendations regarding the agricultural industry and specifically the meat industry. (R. 3). One of the recommendations included the “reduction of the public’s consumption of animal products which would in turn reduce the long-term health care and environmental costs to the State.” (R. 3). The reduction to animal products in a persons diet would not only help the person but would also help to improve the environment and reduce animal cruelty. (R. 3). New York State established a web site in which the details regarding the health risks from a predominantly meat diet. (R. 4). Additionally, the site contained information about cruelty to animals for each specific animal. (R. 4). The site also recommended sustainable farms to purchase meat from. (R. 4).

Reducing the amount of animal products ingested has many benefits to the consumer. The prevention and reversal of “ heart disease, cancers, type 2 diabetes, stroke, and hypertension” are all possible, as well as a reduction in medical costs to both the State and individuals. (R. 4). The antibiotics fed to livestock interfere with human medications. (R. 6).

Furthermore, reducing animal consumption would help the environment. Factory farms (CAFOs- Confined animal feeding operations) have a strong negative impact on the environment. (R. 8). CAFOs are operations where many animals live in tight unnatural quarters. (R.8). Frequently, CAFOs incorrectly dispose of manure causing problems including: antibiotic use, water pollution, air pollution, and unnecessary suffering of animals. (R. 8, 9,11). Large amounts of antibiotics are required to maintain health livestock; however, these antibiotics affect humans after consumption. (R. 8). CAFOs are located on small amounts of land unable to

manage the large amounts of manure produced. (R. 9). This creates run off onto other land and into streams. (R. 9). Nitrogen and phosphorus are the two major pollutants from manure. (R. 9). Another pollutant created from the improper disposal of manure is ammonia. (R. 10). Ammonia is a harmful pollutant to both humans and the environment. (R. 10). Ammonia can cause respiratory disease in humans, and deforestation to the environment. (R. 10). Moreover, manure creates carbon dioxide, methane, and nitrous oxide all gases responsible for global warming. (R. 11). CAFOs are harmful to animals. CAFOs are unnatural and cause extreme stress to pain to the animals living in them. (R. 11).

SUMMARY OF THE ARGUMENT

The District court improperly granted summary judgment based on the determination that the APCIA is unconstitutional via the Supremacy Clause and Commerce Clause of the U.S. Constitution.

The District court correctly found that the Animal Products Consumer Information Act (APCIA) is not preempted by the Federal Meat Inspection Act (FMIA), and therefore is constitutional under the Supremacy Clause of the U.S. Constitution. The APCIA placard requirement does not constitute “labeling.” If however, this Court establishes that the placard requirement does constitute “labeling,” the APCIA upholds its constitutionality and is not preempted by the FMIA. Regardless of a “labeling” or not “labeling” finding, the APCIA is not preempted by the FMIA. There are two categories of preemption: expressed and implied. The absence of both preemption categories establishes that the APCIA placard requirement is not preempted by the FMIA.

The district court erroneously held that the APCIA was unconstitutional for violating the Commerce Clause, simply because there exists alternative means of advancing the state’s

legitimate interest in protecting the health and safety of its citizens. The Court should have first analyzed whether the APCIA actually “regulates” interstate commerce, which it does not. Even in the event that the district court finds that the statute operates to regulate interstate commerce, the statute should only be struck down for violation of the Commerce Clause upon a finding that the regulation is either discriminatory on its face, or discriminatory in effect.

In the case at hand, the district court properly reasoned that the APCIA was not facially discriminatory. However, there exists genuine issues as to material facts with respect to whether the statute imposed disparate burdens on out-of-state interests as compared to those in-state, or whether the APCIA’s burden on interstate commerce was “clearly excessive” according to the *Pike* test. Therefore summary judgment was not warranted.

STANDARD OF REVIEW

This case involves the issues of preemption of a state law under the Supremacy Clause, and the validity of a state law in accordance with the dormant Commerce Clause of the United States Constitution. When evaluating the constitutionality of the APCIA placard requirement this Court should use a de novo standard of review. *David P. Coldesina, D.D.S, P.C., Empl. Profit Sharing Plan & Trust v. Estate of Simper*, 407 F. 3d 1126 (10th Cir. 2005). Likewise, when considering whether a statute discriminates impermissibly against interstate commerce is a mixed question of law and fact that is also reviewed de novo. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE MEAT CONSUMER INFORMATION ACT IS NOT PREEMPTED BY THE FEDERAL MEAT INSPECTION ACT, AND THUS IS CONSTITUTIONAL UNDER THE SUPREMACY CLAUSE FOUND IN ARTICLE IV OF THE UNITED STATES CONSTITUTION.

A. **The APCIA Placard Requirement Does Not Constitute “Labeling.”**

The APCIA placard requirement does not constitute a label or labeling, thus the requirement is not preempted by the FMIA. The APCIA requires a public interest warning sign to be placed in retail locations where “animal products intended for human consumption” are sold. (R. 2). “The term “label” means all “labels and other written, printed, or graphic matter upon the immediate container (not including package liners) of any article.” 21 U.S.C. §601(o). The APCIA placard requirement does not represent or constitute a label, but rather is a separate sign or notice which is not placed on the animal product/container itself. (R. 12).

The term “labeling” means “all labels written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.” 21 U.S.C. §601(p). According to *Gershengorin v. Vienna Beef, Ltd.*, a separate sign in the vicinity of the animal product does not represent labeling for the meat product itself. 2007 U.S. Dist. LEXIS 73202, 9-10 (N.D. Ill. 2007).

Similarly, in *Chemical Specialties Mfrs. Assn’ v. Allenby*, warning signs illustrating the health risks associated with chemicals were not deemed additional labeling. 958 F. 2d 941 (9th Cir. 1992). The California Safe Drinking Water and Toxic Enforcement Act of 1985 (“Proposition 65”) required that manufacturers of known health risk substances to display warnings to consumers. *Id.* The issue is whether Proposition 65 is preempted by FIFRA and FHSA. The court found that FIFRA and FHSA do not preempt Proposition 65 because the warning sign is not found to be labeling. *Id.* “Labeling is better understood by its relationship,

rather than its proximity, to the product.” *Id.* “Generally, it is conceived as being attached to the immediate container of the product in such a way that it can be expected to remain affixed during the period of use.” *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2nd Cir. 1989). Given that, in this case, the APCIA does not require any type of notice to be attached or accompany the product beyond the sale stage of production, therefore the sign/notice in question is not labeling.

This case is distinguishable from *Kordel v. United States*, because in *Kordel* the literature in question remained with the product (medical drug) from sale to customer use. 335 U.S. 345 (1948). The pamphlet contained warnings as well as directions for using the drug. *Id.* Therefore, the pamphlet is labeling. The APCIA warning does not travel with the animal product nor does it contain directions for cooking/consuming animal products.

Labeling regulations determined by federal law may require the label to contain warning notices; however, this does not ban additional warning requirements. *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2nd Cir. 1989). Thus, even though FMIA contains safety notices, additional warning signs implemented by the APCIA are not guaranteed to constitute labeling. Notices informing consumers do not establish labeling. *American Meat Institute v. Ball*, 424 F. Supp. 758 (W. D. Mich 1976). If a notice is attached to the meat product it is deemed read by consumers. However, a notice placed in the vicinity of the meat product cannot be deemed read.

The APCIA placard requirement is more geared to public awareness than specific product information. The placard requirement is tied to public awareness and contains little to do with the product itself. The APCIA requirement is not on the package, does not contain language about the animal product, and does not contain directions about the product. The consumption of

animal products is not directly related to the placard requirement. The consumer has the option to follow or ignore the placard.

The lower court determined that, “ if the placard requirement constitutes labeling, then the Court must determine if the APCIA is preempted by FMIA.” (R. 12). However the APCIA placard requirement does not constitute labeling; ergo, the FMIA regulations cannot preempt the APCIA placard requirement.

B. If this Court finds the APCIA placard to constitute “labeling,” the APCIA is once more not preempted by the FMIA.

In the event this court finds that the APCIA placard constitutes labeling, the APCIA is still not be preempted by the FMIA regulations. Labeling is defined as, “all labels written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.” 21 U.S.C. § 601(p). The APCIA placard requirement is not an additional label placed upon the animal product; however, the APCIA placard does accompany the animal product. (R. 12).

The lower court defined accompanying as “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.” (R. 12). *Meaunrit v. ConAgra Foods Inc.*, established that in store pamphlets and display signs/ posters constitute accompanying and therefore labeling. 2010 LEXIS 73500 (N.D. Cal. 2010). Here, the APCIA placard requirement is deemed labeling because it is an in store poster which accompanies, via proximity, the animal product. While the APCIA placard requirement can be deemed as labeling, this description does not automatically create preemption.

C. The APCIA is not preempted by the FMIA.

The regulations in place by the FMIA do not block the APCIA placard requirement; therefore, the APCIA requirements are constitutional. FMIA's position is that "marketing, labeling, packaging, or ingredient requirement in addition to, or different than, those made under this Act may not be imposed by any State..." 21 U.S.C.A. § 678. However, "any State... may, consistent with the requirements under this Act 21 USCS §§ 601, exercise concurrent jurisdiction... over articles required to be inspected under said title." 21 U.S.C.A. § 678. Valid preemption of a federal law over a state law can be determined two ways: expressed or implied. *Gade v. National Solid Waste Management Association*, 505 U.S. 88 (1992).

Expressed preemption is written directly into the statute. Legislative drafters explicitly write into the statute their intent. *Id.* A statute including expressed preemption will contain "explicit preemptive language." *Id.*

Implied preemption is determined based on intent. There are two types of implied preemption: field and conflict. *Gade v. National Solid Waste Management Association*, 505 U.S. 88 (1992). Field preemption is "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." *Id.* "The scope of a statute indicates that Congress intended federal law to occupy a field exclusively." *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). Conflict preemption is "where compliance with both Federal and State regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. 88. The state law must be in actual conflict with the federal law, thus rendering one of the two impossible to carry out. *Freightliner Corp.*, 514 U.S.

280. In situations where there is no conflict between the two statutes, and Legislation did not intend to fully occupy the field of law preemption is erroneous. *Id.*

The overriding factor for both expressed and implied preemption is legislative intent. *California Federal Saving and Loan Association v. Guerra*, 479 U.S. 272 (1987). If Congressional intent is to have federal law preempt state law on any legal issue, then the state law is unconstitutional. *Id.* Legislative history can be examined as a way to determine Congressional intent when it is statutorily unclear. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). Congressional intent is not to automatically preempt State law with Federal law. *Id.* States were given police powers under the Constitution, which should be respected unless with absolute certainty that Federal law is the ruling body. *Id.* Courts should use caution when determining preemption cases. *N.Y. State Department of Social Services v. Dublino*, 413 U.S. 405 (1973).

In the case at bar, the FMIA Act does contain explicit language pertaining to preemption; however, this language is specifically stated to encompass labeling only. 21 U.S.C.A. §678. Moreover, the APCIA placard requirement does not constitute labeling, thus the specific facts of this case do not fit within the expressed preemption language of the FMIA statute.

If, however, it is established that the APCIA placard does constitute labeling, the expressed language of the FMIA statute does not automatically render a preemption outcome. The congressional intent in regards to the implied preemption aspect must be analyzed. “The primary intent of the federal labeling requirements is to protect the health and welfare of consumers from fraudulent or deceptive practices by manufacturers and distributors of meat products.” (R. 14). The APCIA placard does not require any information regarding the protection of consumers from fraudulent labeling. (R. 14). The root of the APCIA requirement is to inform

consumers of the risks of maintaining a predominately animal diet, and the effects of the market on the animals themselves. (R. 3).

“The goal of the New York law is to “protect citizens of this state by providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively affects health, the environment, and imposes unnecessary suffering on animals.” N.Y. Agric. & Mkts. Law §1000.3. (R. 14).

Congressional intent for the FMIA labeling requirements was not to limit or restrict literature concerning healthy diets and animal rights, but to protect consumers from fraudulent practices. (R.14).

The FMIA labeling regulation does not engulf the entire field of animal consumption and welfare; therefore this is not a situation of field preemption. (R.15). The statute itself allows for additions to be made when seen as necessary by State Legislators. “This Act shall not preclude any State... from making requirements or taking other action, ... with respect to other matters regulated under this Act.” 21 U.S.C.S §678. Additionally, the NY state regulation can function in connection with Federal regulation. The regulations are not in actual conflict with each other, thus rendering compliance with both possible. *Freightliner Corp.*, 514 U.S. 280 (1995). The Federal law deals in the area of meat inspection and burden placed on manufacturers, while the N.Y. State law deals solely in distribution regulations. (R.15). Given that the regulations cover different areas of the field, they both can function in conjunction with each other. *Gade*, 505 U.S. 88. Thus, this is not a situation of conflict preemption. With the elimination of both field and conflict preemption, it is determined that implied preemption is not apparent in this case.

This case is distinguishable from *Jones v. Rath Packing Co.*, because in *Jones* the statute contained expressed language that rendered preemption. 430 U.S. 519 (1977). The Wholesome Meat Act regulation governs the weight of meat on labels. This Act allows for changes in some

weight given the humidity and moisture loss after packaging and during transportation. *Id.* The California State Act did not allow for changes in weight after packaging. *Id.* Congressional intent for the Federal regulation of weighed meat (specifically bacon) was to allow for consumer clarity. *Id.* Under the Federal regulation, consumers were able to compare bacon packages from multiple manufactures located in different states. Given that both the Federal regulation and the State regulation could not be complied with simultaneously, the Federal regulation must preempt the State regulation. *Id.* *Jones* contains both expressed and implied preemption while the case at hand has neither.

The information covered in the FMIA regulation is different from and does not encompass the information covered in the APCIA placard. Consequently, the FMIA labeling regulation does not preempt the APCIA placard requirement given the absence of both expressed and implied preemption.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE APPELLEES BECAUSE THE APPELLEES FAILED TO ESTABLISH THAT THE APCIA VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Federal Rules of Civil Procedure provide that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. In granting summary judgment, the lower court reasoned that “[s]ince there are other ways in which the state could have promoted the same local interests without burdening interstate commerce, the [APCIA] is unconstitutional for violating the Commerce Clause.” (R. 21.) However, the district court improperly interpreted the Commerce Clause by finding that a state law will be held unconstitutional simply because there are alternative means to promote the local interests intended by it. Not only is this

reasoning by itself insufficient to support a finding that the state law is unconstitutional for violating the Commerce Clause, there exists genuine issues of material facts as to that finding (as well as other findings required to prove the law is in violation of the Commerce Clause) therefore precluding an award of summary judgment.

The Commerce Clause of the United States Constitution states that “Congress shall have Power ... [t]o regulate Commerce ... among the several States.” U.S. Const. art. I, § 8, cl. 3. Although the Constitution does not explicitly restrict state power in this respect, the explicit power granted to Congress has long been understood to limit the power of the states in regulating interstate commerce. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 47 (2nd Cir. 2007). This well-established doctrine implied in the Constitution, known as the “dormant Commerce Clause,” restricts the authority of state governments to create laws that negatively affect or burden the flow of interstate commerce. *Id.* (citing *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727 (1979)). However, the restriction on state power to regulate commerce is not absolute. The Supreme Court has long held that states “retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.” *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal citations omitted).

In determining whether a state statute is unconstitutional for violating the Commerce Clause, the Court must examine whether the law actually “regulates,” and if so, whether that regulation is discriminatory on its face or by its incidental effects interstate commerce. *Brown v. Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208-09 (2nd Cir. 2003) (internal citations and quotations omitted); *Town of Southold*, 477 F.3d 38, 47. Finally, if the statute is not found to be discriminatory on its face and its burden on interstate commerce is only minimal, then the Court need not proceed in analyzing whether alternative measures exist that have a lesser impact on

interstate commerce. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams*, 720 F. Supp. 284, 293 (S.D.N.Y. 1989).

A. The APCIA does not regulate interstate commerce.

When faced with a Commerce Clause analysis, the first question that must be considered by the Court is whether the state is, in fact, “regulating.” *Brown*, 320 F.3d 208 (internal citations and quotations omitted). “A state regulates when it exercises governmental powers that are unavailable to private parties, such as the imposition of civil or criminal penalties to compel behavior.” If such circumstances are present, the necessary inquiry that follows is whether that regulation affects interstate commerce. *Id.*

It is undisputed in the present case that the APCIA is a “regulation” because it imposes a civil penalty of one thousand dollars per day for violation of the statute. N.Y. Agric. & Mkts. Law § 1000.4. However, the statute does not regulate interstate commerce because it does not require any CAFOs or small farms to take action, nor does it prohibit or impede the flow of their product through the states. The critical inquiry is “whether practical effect of regulation is to control conduct beyond boundaries of state.” *Healy v. Beer Institute, Inc.* 491 U.S. 324, 336 (1989). Here, the conduct of the NMPA, as well as all other meat producers, whether in-state or out-of-state, is not altered in any way. Rather, the in-state *retailers* of meat products are required to take action by posting an informational sign within their store; the appellees are not subject to any civil penalties resulting from their conduct. Furthermore, nothing in the APCIA impedes the flow of commerce through the states. The statute simply purports to inform the public about proven health, environmental and animal welfare impacts resulting from meat consumption in general and industrial animal agriculture in the same way informational notices warning of the negative health effects are included on cigarette packs, tanning booths or aspirin.

The Supreme Court recognizes the importance of states to “legislate on all subjects relating to the health, life, and safety of their citizens” and the commerce clause was never intended to restrict this power. *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 444 (1960) (internal citations omitted). “Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.” *Id.* As such, the New York legislature was lawfully permitted in enacting the APCIA because it does not regulate the conduct of out-of-state companies or burden the flow of interstate commerce.

B. The APCIA is not per se invalid under the dormant Commerce Clause because it does not clearly discriminate against interstate commerce in favor of in-state commerce.

If it is established that the APCIA regulation impacts interstate commerce, the Court must then determine whether the law is clearly discriminatory or facially neutral but discriminatory in effect. *Town of Southold*, 477 F.3d 38 at 47. “A statute that clearly discriminates against interstate commerce in favor of intrastate commerce is virtually invalid per se and will survive only if it demonstrably justified by a valid factor unrelated to economic protectionism.” *Id.* Discrimination within the meaning of the Commerce Clause is defined as “differential treatment of in-state and out-of-state economics that benefits the former and burdens the latter.” *Id.* (internal citations omitted).

In *Town of Southold v. Town of East Hampton*, the Second Circuit affirmed the lower court’s finding that a municipal regulation restricting ferry service to and from the town was not per se invalid under Commerce Clause because the law applied equally to all in-state and out-of-state ferry operators and the challenging party failed to identify any local interest favored by it. *Id.* at 45. In its reasoning, the Court concluded that the regulation was not facially

discriminatory because the evidence was insufficient to show that the Ferry Law was enacted for the purpose of discriminating against out-of-state interests: “[t]he record more than supports the district court’s conclusion that the law was not motivated by a discriminatory animus but by the need to address a growing traffic problem in the Town.” *Id.* at 48.

The circumstances in *Town of Southold* are so similar to the instant case as to compel the same result. Here, the district court properly concluded that the APCIA is not discriminatory on its face because it treats both in-state and out of state products equally. (R. 18) As in *Town of Southold*, the any affect on commerce will occur from both out-of-state and intrastate sources equally. (R. 18) Further analogous to *Town of Southold*, the APCIA was not enacted for the purpose of discriminating against out-of-state interests. Rather the APCIA was enacted to:

“protect the citizens of [the] state by providing and encouraging the dissemination of information about how animal agriculture and the consumption of animal products negatively affects health, the environment, and imposes unnecessary suffering on animals.”

N.Y. Agric. & Mkts. Law §1000.3. The text of the statute demonstrably justifies its enactment by a valid factor unrelated to economic protectionism, that is, to advance legitimate local interests of the environment, public health and welfare of animals. As such, the district court correctly held that the APCIA was not discriminatory on its face.

C. The APCIA Does Not Impose An Excessive Burden Under the *Pike* Balancing Test.

If the party challenging the state statute cannot show that the regulation clearly discriminates on its face but only indirectly affects interstate commerce, the Commerce Clause analysis then turns to the *Pike v. Bruce Church* balancing test wherein the challenging party must show actual undue burden on interstate commerce that is “clearly excessive in relation to the

putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Pike* balancing test provides:

[if] a legitimate local purpose is found, then the question is one of degree. Ant the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, on whether it could be promoted as well with a lesser impact on interstate activities.

Id. See also *Nat’l Electric Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 109 (2nd Cir. 2001); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2nd Cir. 2003).

The burden is on the moving party to show, at a *minimum*, that the statute “impose[s] a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce.” *Sorrell*, 272 F.3d at 109. Under the *Pike* test, if no such unequal burden is shown then the court need not proceed further in its analysis. *Id.*

In *Brown & Williamson Tobacco Corp. v. Pataki*, the Second Circuit reversed the lower court’s finding which struck down a New York Public Health Law that prohibited cigarette sellers from shipping and transporting cigarettes directly to consumers. *Id.* at 203-04. New York’s purpose in enacting the law was that the direct shipment of cigarettes to consumers “pose[d] a serious threat to public health, safety, and welfare, to the funding of health care and to the economy of the state” because it was difficult to verify the consumer’s age. *Id.* at 204. The lower court held that the state’s legitimate interest in protecting the public was outweighed by the “substantial interference” imposed on interstate commerce because the only way out-of-state sellers could legally sell to New York consumers was by building an actual retail establishment. *Id.* at 203, 212.

In reversing this conclusion, the Second Circuit found that the statute did not discriminate in effect for a number of reasons: for one, that fact that cigarette sellers must operate out of an actual retailer applied to both in-state and out-of-state retailers and therefore the law did not

discriminate against only out-of-state cigarette sellers. *Id.* at 212. Also, the fact that the evidence showed that at least three companies would be unable to continue doing business in the state as a result of the statute did not constitute an excessive burden on interstate commerce because “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.” *Id.* Furthermore, the party challenging the statute did not provide any evidence suggesting that “any alleged hardship would be borne disproportionately by out-of-state shippers” then by in-state shippers; in-state sellers could likewise face the same difficulties as those out-of-state. *Id.* Most importantly, the Second Circuit found that the New York Health Law did not impede or negatively affect the flow of interstate commerce because statute did not prohibit consumers’ access to cigarettes, it merely required that they purchase cigarettes in a manner that allows the seller to legally verify their age. *Id.* at 214.

Analogous to the statute being challenged in *Brown* but perhaps effectuating even less of an impact on interstate commerce, here the APCIA likewise failed the *Pike* balancing test because the appellees have failed to show that the statute creates burden that is clearly excessive in relation to the legitimate state interests being advanced by the State. First, the APCIA sign requirement does not reference only out-of-state CAFOs. Like the health law in *Brown*, the APCIA applies to both in-state *and* out-of state industrial farmers. The impact of the statute on interstate commerce therefore does not qualitatively or quantitatively differ from that imposed on intrastate commerce.

Moreover, the appellees, who bear the burden of showing a discriminatory effect, have not provided a scintilla of evidence that they, or the national meat consumer market, has or will experience actual burden. Even confronted with actual evidence that three out-of-state

companies will be forced to cease operation as the result of the statute, the Court in *Brown* nonetheless held that this effect was considered so burdensome as to render the regulation unconstitutional because it was not shown that the national market would be burdened. Here, the appellees have not established any harm in the interstate marketplace, let alone show that they particularly have been burdened. Accordingly, the APCIA may not be struck down on a mere allegation that interstate commerce may possibly be burdened without a showing that its regulation affects commerce in some way.

Finally, like the health law in *Brown*, the APCIA neither impedes nor obstructs the flow of meat products in interstate commerce in any way. The statute merely provides an informational resource as a means of aiding consumers in their decision of which products to buy. Consumers are not directed to purchase from non-industrial farmers or even in-state farmers, they are free to purchase any product they wish. Thus, since the APCIA does not prohibit the purchase of or burden the movement of meat produce through the interstate market thereby obstructing the flow of interstate commerce, the statute cannot be held to be discriminatory in effect.

D. The District Court improperly concluded that a consideration of reasonable alternatives was necessary or sufficient to find that the APCIA violated the Commerce Clause.

The district court granted summary judgment in favor of the appellees on the sole basis that there is a possibility of the existence of alternative measures to further the state's interest without burdening interstate commerce. (R. 21) This reasoning is entirely flawed for two reasons: first, as explained in the preceding paragraphs, the APCIA does not burden interstate commerce either on its face or in effect. *See* §§ II (B), (C), *supra*. Second, where it is found that the burden of a state law on interstate commerce is not excessive, and the statute did not

discriminate against out-of-state interest in favor of intrastate commerce, “there is no need to consider any alternative that might have had a lesser impact in interstate commerce prior to ruling that the statute did not violate the Commerce Clause.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams*, 720 F. Supp. 284, 293 (S.D.N.Y. 1989).

In *Motor Vehicle Manufacturers*, trade associations representing automobile manufacturers and transporters challenged the constitutionality of New York’s “Lemon Law,” which addressed the widespread dissatisfaction by consumers of the quality of new vehicles. *See id.* The Southern District found that although the statute has somewhat of an impact on interstate commerce because it required New York car dealers to provide written notice of consumer complaints to manufacturers, the burden did not outweigh the legitimate local interest of protecting consumers nor did it discriminate against out-of-state interests. *Id.* When these circumstances are present, a consideration of lesser burdensome measures is not required, nor do such alternative need to be addressed. *Id.*

The circumstances in the case at hand are parallel to those in *Motor Vehicle Manufactures* in that the APCIA does not discriminate against out-of-state meat producers in favor of in-state producers, either on its face or in effect (*see* §§ II (B), (C), *supra*). Regardless, any impact on interstate commerce is miniscule considering the appellees have not provided any evidences supporting an assertion that interstate commerce is affected. Where there is an absence of any proof that commerce is affected, it follows that interstate commerce cannot be considered “excessively” burdened. As in *Motor Vehicle Manufacturers*, the need to consider alternative ways to address the legitimate state interest advanced by the APCIA is not required.

Accordingly, the district court’s determination that the APCIA is unconstitutional based on the single allegation that there are other possible ways New York can address its interest in

protecting the public health, environment and animal welfare, is improper and the grant of summary judgment based on this finding alone is wholly erroneous.

CONCLUSION

The foregoing evinces that the APCIA is not preempted by the FMIA. Moreover, general issues of material fact exist as to whether the APCIA imposes a disparate burden on interstate CAFOs in comparison to in-state CAFOs, and whether the burden on interstate commerce was clearly excessive when compared to local benefits. Accordingly, summary judgment in favor of the NPMA is not warranted and the decision by the district court should be REVERSED.

Respectfully Submitted,

Team 7
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