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

APPEAL FROM THE JUDGMENT ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, NATHANIEL C. ALEXANDER, DISTRICT JUDGE, PRESIDING

BRIEF FOR APPELLANTS

Team 15
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LEWIS AND CLARK LAW SCHOOL
NATIONAL ANIMAL LAW MOOT COURT COMPETITION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Miscellaneous

STATEMENT OF ISSUES FOR REVIEW

1. Does the Federal Meat Inspection Act preempt the New York State Animal Products Consumer Information Act?
2. Does the New York State Animal Products Consumer Information Act violate the Commerce Clause of the U.S. Constitution?

STATEMENT OF THE CASE

The parties to this case are the Commissioner of the New York State Department of Agriculture and Markets and the New York State Department of Agriculture and Markets ("Appellants"), and the National Meat Producers Association ("Appellees"). Appellees challenged the New York State Animal Products Consumer Information Act (APCIA), alleging the APCIA violated the Supremacy Clause and Commerce Clause of the U.S. Constitution. Judge Nathaniel C. Alexander of the U.S. District Court for the Southern District of New York held that the Federal Meat Inspection Act (FMIA) did not preempt the APCIA but found that the statute did violate the Commerce Clause and granted Appellees' motion for summary judgment. The New York State government now appeals the District Court's holding to the U.S. Court of Appeals for the Second Circuit.

STATEMENT OF FACTS

The New York State legislature enacted the APCIA in 2010 to protect its citizens 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 (2010). The bill arose out of the Long-Term Reduction of Government Costs Without Cutting Benefits Committee ("Committee"), which examined various ways the State might reduce its costs. *See Nat'l. Meat Producers Ass'n v. N.Y. Dept. of Agric. & Mkt.*, No. CV 11-55440 NCA, slip op. at 3 (S.D.N.Y.

Sept. 15, 2012). Many of the cost-saving recommendations of the Committee centered on public health and the environment. *Id.* The Committee found significant costs to human health and the environment as a result of the animal agriculture process. *Id.* In considering the issues of animal farming and meat consumption, the Committee heard testimony from experts in the fields of nutrition, public health, the environment, and animal welfare. *See Nat'l. Meat Producers Ass'n*, No. CV 11-55440 NCA, slip op. at 3-11, App. B.

The Committee heard testimony about the associations between consumption of animal products and chronic and infectious diseases. *See id.* at 5-6. According to the Union of Concerned Scientists, hospitalizations and treatment of *Salmonella* cases alone cost about $2.5 billion per year. *Id.* at 6. The incidences of zoonotic disease have exploded in recent years, all arising from animals confined in agricultural operations. *Id.* at 7. The Committee also heard testimony about the environmental costs of industrial farming.[1] *See id.* at 8-11. Finally, the Committee heard testimony about the welfare of animals raised for food. Animals in the beef, pork, dairy, veal, and poultry industries are subject to invasive, stressful, and painful procedures such as: castration, restrictive housing (gestation and farrowing crates), tail docking, and debeaking. *See* Rollin Aff. 1, 5-7, 10, 16.

The legislature's goal in creating the APCIA was to reduce the costs to the State associated with health care and environmental degredation, but also to make the public aware of the practices involved in keeping and slaughtering animals for meat. *Id.* at 3. The APCIA sections 4.1 and 4.2 require that restaurants and retail stores that sell animal products post the

[1] In New York, the cost to mitigate leaching from dairy and hog concentrated animal feeding operations (CAFOs) will cost an estimated $56 million. *Id.* at 9. The indirect costs are difficult to measure, but include loss of revenue to industries dependent on natural resources and contamination of local drinking water.

following information on a yellow placard, not less than eighteen by twenty-four inches and printed in red letters not less than one and a half inches high:

> 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. Animal handling 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 §§ 1000.4.1-4.2.

The website established by the APCIA, www.informedchoice.ny.gov, provides detailed information on the health effects of consuming animal products and the impact of animal agriculture on the environment and animal suffering. *Nat'l. Meat Producers Ass'n*, No. CV 11-55440 NCA, slip op. at 4. The website also provides a list of farms that New York certified as environmentally sustainable and humane. *Id.* The only farms listed are located within New York, but the statute does not require that only New York farms be listed, nor does it provide any kind of favorable treatment or exemptions for in-state farms that appear on the list. *See id.*; N.Y. Agric. & Mkts. Law § 1000 (stating no requirements that the website list only New York farms or require consumers to buy from New York farms). The text of the APCIA contains no requirements or statements about the information contained on the website at all. *See id.*

SUMMARY OF ARGUMENT

This case is about the authority of the states to protect the health and welfare of their citizens, which are fundamentally and historically matters of local concern. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). The APCIA falls squarely within this authority. The APCIA is not preempted by the FMIA because the required placard is not "labeling" that "accompanies" animal products for human consumption within the plain meaning of the FMIA. The trial court correctly held that the APCIA did not infringe on any territory expressly reserved by the FMIA.

The trial court also correctly held that the APCIA does not offend the Supremacy Clause by field or conflict preemption.

However, the trial court committed reversable error in holding that the APCIA violates the Commerce Clause. The decision below applies unsubstantiated factual assumptions to erroneous law. In holding that an otherwise valid, nondiscriminatory law is unconstitutional solely because the State could have promoted the same goals without burdening interstate commerce is a departure from Supreme Court precedent. Appellees fail to demonstrate any evidence in the record that the APCIA is discriminatory or has any burden on interstate commerce, therefore the APCIA does not violate the Commerce Clause. Alternatively, summary judgment as a matter of law was inappropriate because there are genuine issues of material fact as to whether the APCIA discriminates or imposes an impermissible burden on interstate commerce when weighed against the legitimate state interests and existence of less restrictive alternatives.

STANDARD OF REVIEW

On an appeal of a motion for summary judgment, the standard of review is de novo. *Nadel v. Isaksson*, 321 F. 3d 266, 272 (2d Cir. 2003). The reviewing court must view the record in the light most favorable to the party opposing the motion for summary judgment, and make all reasonable inferences in that party's favor. *Jaegly v. Couch*, 439 F. 3d 149, 151 (2d Cir. 2006). This Court should affirm the district court's decision only if, after construing the evidence in the light most favorable to the State and drawing all reasonable inferences in its favor, there is no genuine dispute as to any material fact and the Appellees are entitled to judgment as a matter of law. *See In re Publ'n Paper Antitrust Litig.*, 690 F. 3d 51, 61 (2d Cir. 2012). Additionally, this Court has stated that summary judgment is not a substitute for trial. *Id.*

Thus, when the evidence admits of competing permissible inferences with regard to whether the Appellees are entitled to relief, the question of what weight should be assigned to those inferences remains within the province of the fact-finder at a trial. *Id.* If the statements by the District Court as to its reasons for granting summary judgment are merely conclusory, it is appropriate for this Court to vacate the District Court's order granting summary judgment. *See Hilton v. Wright*, 673 F. 3d 120, 126 (2d Cir. 2012).

ARGUMENT

I. THE FMIA DOES NOT PREEMPT THE APCIA

The Supremacy Clause of the U.S. Constitution requires preemption of state and local laws that interfere with or are contrary to federal law. *See* U.S. Const. art. VI, cl.2.; *Gade v. Nat'l. Solid Waste Mgmt. Ass'n.*, 505 U.S. 88, 108 (1992). However, courts must start with the assumption that the historic police powers of the states to regulate for the public health, safety, and welfare are not to be superseded by the federal act absent clear and manifest congressional intent. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Medtronic,* 518 U.S. at 485. There are three ways a court may find preemption of a state law. *See Gade*, 505 U.S. at 98. First, Congress may expressly preempt state law by explicit language in the federal statute. *Id.* Second, federal law preempts state law where federal regulation is so comprehensive that there is a clear inference that Congress intended to occupy the entire field. *Id.* Third, federal law preempts state law where compliance with both is impossible, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* This is known as conflict preemption. *Id.*

The trial court held that the FMIA does not expressly preempt the APCIA because it does not require any action that is in addition to or different from the requirements under federal law. *See Nat'l. Meat Producers Ass'n*, No. CV 11-55440 NCA, slip op. at 16-17 (distinguishing from

previous cases finding preemption where state labeling addressed information also covered by the FMIA, such as weight or ingredients of a product, while the APCIA requires language outside that scope). The trial court also held that there is no field or conflict preemption by the FMIA. *See id.* at 15.

Here, the FMIA does not expressly preempt the APCIA because the APCIA does not regulate the same activities that fall within the FMIA's preemption clause. Additionally, the FMIA does not apply to health, environmental, and animal welfare statements, and thus, there is no field preemption of the APCIA. Finally, the requirements of the APCIA do not in any way conflict with the requirements of the FMIA, nor do they frustrate the purpose of the FMIA's regulations. Therefore, the trial court correctly held that the FMIA does not preempt the APCIA.

A. The FMIA Does Not Expressly Preempt the APCIA

The trial court did not err in holding that the FMIA does not expressly preempt the APCIA. The FMIA's preemption clause prohibits states from imposing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter" on any articles prepared at facilities subject to inspection under the FMIA. 21 U.S.C.A. § 678 (West 2012). Where, as in the FMIA, there is statutory language expressly preempting state law, the issue before the court is Congress' intent as to the scope of preemption. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001) ("Congressional purpose is the 'ultimate touchstone' of our inquiry.") (Citations omitted).

Here, summary judgment in favor of the State is appropriate because there are no genuine issues of material fact as to whether the APCIA falls outside the scope of the preemption clause of the FMIA: the APCIA placards do not constitute "labeling," nor do they "accompany" regulated meat products within the definition of the FMIA. Thus, the State is entitled to judgment as a matter of law. Alternatively, even if the APCIA placards do constitute "labeling"

or "accompany" regulated products within the meaning of the FMIA, summary judgment in favor of the State is still appropriate because the APCIA does not operate within the same territory preserved for the federal government under the FMIA's preemption clause.

1. The APCIA Placards are Not "Labeling" Under the FMIA

The purpose of the FMIA is to assure that meat food products distributed to consumers are wholesome, not adulterated, and properly marked, labeled, and packaged. 21 U.S.C.A. § 602. To further this goal of assuring quality and preventing mislabeling, the FMIA preempts state laws that require labeling that is different from the federal requirements. *Id.* § 678. The FMIA defines labeling as "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." *Id.* § 601(p). Additionally, the labeling, marking, and container requirements of the FMIA require the USDA-inspected label, if not directly on a product's wrapper, to be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment subject to federal inspection. *See id*. § 607(a). Here, the APCIA placards do not consitute "labeling," nor do they "accompany" a product within the meaning of the FMIA.

Courts interpreting the FMIA's labeling definition have begun with the plain meaning of the statutory language. *Am. Meat Inst. v. Ball*, 424 F. Supp. 758, 763 (W.D. Mich. 1976) ("The best place to begin is obviously the language of the statute itself and the definition utilized by Congress ... Legislative language is generally most faithfully construed when it is held to mean simply what it says, read with common sense.") (Citations omitted). Additionally, statutory terms must be construed according to the "subject, the context, [and] the intention of the authors." *McCulloch v. Md.*, 17 U.S. 316, 415 (1819).

The APCIA placards are not "labeling" within the common-sense meaning of the FMIA, nor was it the intention of Congress to include placards like those required by the APCIA within

this definition. First, the APCIA placard are not "labeling" because they are not written or printed material that is affixed in any way to a specific product's wrapper, container, or covering as specified in the FMIA. *See* N.Y. Agric. & Mkts. Law §§ 1000.4.1-4.2. Rather, the placards provide general information about an entire class of food products without mentioning any product in particular and are displayed in retail stores and restaurants. *See id.* Thus, the APCIA placards are distinguishable from cases finding a state notice requirement to be a "label" under the FMIA. *See Am. Meat Inst. v. Leeman*, 180 Cal. App. 4th 728, 761 (2009) (finding point-of-sale warning which stated "*this* product contains a chemical known … to be a carcinogen or a reproductive toxin" to be "labeling" under the FMIA) (emphasis in original). The warning in *Leeman* identified a specific product. In contrast, the APCIA provides general information about health risks and common industry practices, without mentioning any individual product or type of animal product. *Id.*

Additionally, the APCIA placards do not "accompany" meat products because they are not placed with or packed in a container with any products at a federally-inspected facility. *See* N.Y. Agric. & Mkts. Law §§ 1000.4.1-4.2. The FMIA does not define "accompanying." However, the FMIA focuses on meat packing and rendering facilities and the section 607 labeling requirements contemplate only labels printed on the product wrapper, or placed or packed in any receptacle or covering of the product. *See* 21 U.S.C.A. § 607. Therefore, it is reasonable to infer that "accompanying" means a label not affixed to but packed and shipped with an animal product. *See Ball*, 424 F. Supp. at 767 (finding signage not affixed to product or on container wrapper, and not identifying individual product does not "accompany" a product within meaning of FMIA).

Looking at the plain language of the statute and the common-sense definition of "labeling" in the context of Congress' intent in enacting the FMIA, the APCIA placards are not "labeling" under the FMIA. The purpose of the FMIA is to prevent misbranding of individual products. Thus, taking all reasonable inferences in favor of the State leads to the conclusion that the FMIA intended the term "accompanying" to mean any printed material that is not on a product's container or wrapper but is packed with the product in its receptacle or covering. Since the APCIA placard is not product-specific, is separate from the packaging of the animal product, and placed in retail establishments, the placards do not "accompany" the animal products within the meaning of the FMIA. Therefore, Appellants request that this Court affirm the trial court's holding that the FMIA does not preempt the APCIA.

2. Alternatively, the APCIA is not Expressly Preempted Because it Does Not Infringe on the Territory Preserved for the Federal Government in the FMIA

Even if the APCIA placard does constitute "labeling" under the FMIA, the trial court correctly held that the APCIA placards address different aspects of meat commerce than the FMIA, and thus do not fall within its express preemption provisions. Under the FMIA, states may not impose any "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under [the FMIA]" with respect to products prepared at any federally-inspected facility in accordance with the requirements under the FMIA. 21 U.S.C.A. § 678. To interpret express preemption clauses, the analysis of the scope of preemption begins with congressional purpose, which can be found elsewhere in the statute. *See Medtronic*, 518 U.S. at 485; *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 516 (1992).

Here, Congress intended the FMIA to create comprehensive labeling requirements related to the content and the wholesomeness of meat products. The APCIA's health, environmental, and animal welfare disclosures at issue here do not fall within this purpose. The FMIA

specifically states that its purpose is to protect consumers by "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.A. § 602; *e.g.*, *Am. Pub. Health Ass'n. v. Butz*, 511 F. 2d 331, 332 (D.C. Cir. 1974); *Nat'l. Pork Producers Council v. Bergland*, 631 F. 2d 1353, 1361 (8th Cir. 1980); *Animal Legal Def. Fund Bos., Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278, 283 (D. Mass. 1986). Section 678 of the FMIA, does not allow state labeling requirements that differ from the federal standard outlined in that chapter but it does allow for concurrent state enforcement of the federal objectives and standards for the "purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded." *See* 21 U.S.C.A. § 678. Courts have found that the primary intent of the federal labeling requirements is to regulate what *producers* say about their products and that it is clear that what Congress sought to reach was fraudulent or deceptive practices *by manufacturers or distributors* of regulated products. *See Ball*, 424 F. Supp. at 762, 764 (emphasis added). *Cf. Provimi*, 626 F. Supp. at 286 (holding that FMIA preempted state law false advertising claims based on ingredients and use of antibiotics in veal farming because labels in question passed FMIA labeling standards for wholesomeness); *Meaunrit v. ConAgra Foods Inc.*, No. C 09–02220 CRB, 2010 WL 2867393, at *7 (N.D. Cal. Jul. 20, 2010) (finding that FMIA label-approving process includes determination of whether a product's label is false or misleading, which defeats purpose of additional state requirements).

The purpose of the FMIA is to prevent misbranding or false representations made by manufacturers about their products, including statements about ingredients, weight measurements, or uses of drugs in the farming process. *See* 21 U.S.C.A. § 602; *Provimi*, 626 F. Supp. at 286; *Am. Meat Inst. v. Ball*, 424 F. Supp. at 762, 764. Thus, labeling that is preempted

by the FMIA is labeling that imposes requirements for measurements, ingredients, or disclosures about substances within meat products that are in addition to or different than the FMIA's labeling standards. In contrast, the APCIA directs the actions of retailers and restaurants, not producers, and conveys general information about the impact of animal products on diet, the environment, and animal welfare. *See Nat'l. Meat Producers Ass'n*, No. CV 11-55440 NCA, slip op. at 14. The APCIA does not target any specific products and does not require the manufacturer to provide any information about a product's contents and its goals are unrelated to those of the FMIA. *See id.* Therefore, the trial court correctly held that the APCIA does not infringe upon the territory preserved for the federal government—the branding, labeling, and wholesomeness of meat products.

B. Preemption Cannot be Implied Because Congress Did Not Intend to Occupy the Entire Field of Meat Commerce

In addition to finding that the FMIA does not expressly preempt the APCIA, the trial court correctly found that preemption could not be implied. Field preemption requires a clear congressional intent and occurs when a federal statute's scope indicates that Congress intended federal law to occupy a field exclusively. *See Cal. Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 281 (1987); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Congress' intent to occupy a field must be demonstrated by more than "fragmentary statements." *N.Y. State Dep't of Soc. Serv. v. Dublino*, 413 U.S. 405, 415 (1973) (rejecting argument that preemption may be inferred solely from comprehensive character of federal regulation). Furthermore, where Congress explicitly defines the pre-emptive reach of a statute, it implies that matters beyond that reach are not preempted. *See Cipollone*, 505 U.S. at 517.

Here, the trial court found that Congress did not intend to preempt the entire field of meat commerce under the FMIA. *Nat'l. Meat Producers Ass'n*, No. CV 11-55440 NCA, slip op. at

15. The FMIA's preemption clause is limited only to state enactment of different labeling schemes.[2] Additionally, the FMIA preemption clause expressly allows for states to regulate other areas of meat commerce *besides* labeling:

> This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

21 U.S.C.A. § 678 (emphasis added).

Under *Cipollone*, Congress's creation of an express preemption clause and its allowance for states to regulate areas of meat commerce outside of labeling indicates that Congress did not intend for the FMIA to occupy the entire field of meat commerce regulation. *See* 505 U.S. at 517. With this in mind, any implication that congress intended to occupy the field is fragmented at best, which is not pervasive enough to find implied preemption. *See Dublino*, 413 U.S. at 415. Therefore, states retain authority to regulate meat commerce beyond the reach of the FMIA.

C. Preemption Cannot be Implied Because the APCIA Does Not Conflict With or Frustrate the Purpose of the FMIA

Finally, the trial court correctly found no implied conflict preemption because federally-regulated meat producers and retailers can comply with both the FMIA and the APCIA, and the APCIA does not frustrate the purpose of the FMIA. Conflict preemption occurs 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. at 98. Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. *See Grocery Mfrs. of Am., Inc. v. Gerace*, 766 F. 2d 992, 999 (2d Cir. 1985) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S.

[2] *See supra,* section I.A.2.

190, 204 (1983)). In *Gerace*, this Court found conflict preemption because including the term "imitation" on the label of a nutritionally superior alternative cheese in order to comply with New York law would render the product misbranded under federal law. *Gerace*, 766 F. 2d at 1001 (finding compliance with both the state and federal requirements impossible).

Here, there is no conflict between the requirements of the FMIA and the APCIA for several reasons—the APCIA does not require actions by manufacturers or producers, the APCIA does not concern individual labeling of products, and the APCIA does not concern the same type of labeling as the FMIA. *See generally* N.Y. Agric. & Mkts. § 1000. Likewise, the FMIA does not govern public notices regarding health consequences of a diet high in animal products, nor does it concern the environmental impacts or effects on animal welfare of the commercial meat industry. *See* 21 U.S.C.A. § 601 *et. seq.* The APCIA similarly does not frustrate the purpose of the FMIA, which is to establish a broad inspection scheme to prevent the marketing of adulterated or misbranded meat food products. 21 U.S.C.A. § 602. Therefore, there is no implied preemption between the APCIA and the FMIA because there is no conflict between the statutes.

II. THE APCIA DOES NOT VIOLATE THE COMMERCE CLAUSE

There is no evidence in the record such that a reasonable fact-finder could determine that the APCIA discriminates or burdens interstate commerce. Therefore, the trial court erred in holding, as a matter of law, that the APCIA violates the dormant Commerce Clause.

A. The Dormant Commerce Clause

The Commerce Clause of the U.S. Constitution limits Congress' power to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. The Supreme Court has articulated a negative command within this clause that limits the states' legislative authority where it impedes interstate

commerce, known as the dormant Commerce Clause. *See Am. Trucking Ass'n Inc v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005). Under the dormant Commerce Clause, state laws that are facially discriminatory against out-of-state businesses, without justification, are invalid. *Id.* But even if a statute is non-discriminatory, it may be invalid if the burden on interstate commerce clearly outweighs the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The key principle guiding the court's analysis is to balance the Constitution's authors' desire to avoid divisive competition against the states' authority under the police power to regulate local matters:

> The Commerce Clause … does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

Me. v. Taylor, 477 U.S. 131, 151 (1986) (citations omitted).

The first step in the dormant Commerce Clause inquiry is whether the statute discriminates against interstate trade. *See Am. Trucking*, 54 U.S. at 433. The Court applies a per se assumption of invalidity against a statute which discriminates, in its text, against out-of-state businesses.[3] *See Granholm v. Heald*, 544 U.S. 460, 743-74 (2005); *Or. Waste Sys., Inc. v. Dept of Envtl. Quality of the State of Or.*, 511 U.S. 93, 96 (1994). If a law is facially neutral, it can still be deemed discriminatory in its purpose or effect. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389 (1994) (invalidating city ordinance requiring disposal of non-recyclable waste to private facility because of costs on interstate waste-haulers and because it prevented out-of-state businesses from accessing local market); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350-51 (1977) (finding discriminatory effect where North

[3] "[A] law will be regarded as facially discriminatory if its terms draw a distinction between in-staters and out-of-staters." Erwin Chemerinsky, Constitutional Law: Principles and Policies, 444 (4th ed. 2011).

Carolina law prevented apple growers from Washington from marketing their apples under Washington State's higher grading standards). *Cf. Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978) (upholding state law prohibiting refiners of petroleum products from operating retail gas stations in state, despite statistical evidence of exclusion of out-of-state firms).

If the court finds that a state law is discriminatory, then the second step of the dormant Commerce Clause analysis is whether it is necessary to achieve a "legitimate local purpose." *See Granholm*, 544 U.S. at 489. *See also Taylor*, 477 U.S. at 148 ("Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose."). In *Maine v. Taylor*, the Court upheld a discriminatory law prohibiting the import of live baitfish into the state, finding that the law protected legitimate state interests in preserving its fisheries from parasites and non-native species, and there was no less discriminatory way to protect the fisheries from these threats. 477 U.S. at 141, 151. On the other hand, if a statute is not discriminatory and a court finds no evidence in the record of a burden on interstate commerce, then the law is a valid exercise of the State's police power. *See Am. Trucking*, 545 U.S. at 434-35 (rejecting dormant Commerce Clause claim because state law was not discriminatory and there was "little, if any," evidence in the record of a "significant practical burden upon interstate trade").

If, under the first step of the dormant Commerce Clause analysis, a court finds that the law is not discriminatory, but does have an incidental burden interstate commerce, it then applies a balancing test weighing the burden on interstate commerce against the benefits to the local citizens. *See Pike*, 397 U.S. at 142 ("Where the statute regulates evenhandedly 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."). *See also United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt.*

Auth., 550 U.S. 330, 334 (2007) (upholding city ordinance requiring disposal of waste at a public facility because disposal of trash is a traditional government activity, and benefit to local citizens outweighs "incidental burden" on interstate commerce); *Am. Trucking*, 545 U.S. at 435 (finding $100 per truck fee assessed by state was fair because fee was used to balance costs of regulating and administering public transit safety requirements). That the burden on interstate commerce is "clearly excessive" is a difficult standard to meet. For example, in *Minnesota v. Clover Leaf Creamery Company*, the Court upheld a state law prohibiting the use of non-recyclable plastic milk containers, despite finding a disproportionate burden out-of-state industries, because of the "substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems." 449 U.S. 456, 473 (1981).

In balancing the benefits of the law against the burdens on interstate commerce, the court may consider whether less restrictive means could have achieved the same purpose. *See Pike*, 397 U.S. at 142 ("And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."). *See also Clover Leaf*, 449 U.S. at 473 (upholding state law because it was not discriminatory, served important state interests in protecting the environment, and finding no alternative with lesser burden on interstate commerce available). Only in cases where the Supreme Court has first found a state law to be discriminatory has it invalidated the law based on the existence of less restrictive alternatives. *See e.g, Hughes v. Okla.*, 441 U.S. 322, 337 (1979) (invalidating state law prohibiting shipment of minnows out of state because it was facially discriminatory and not least restrictive method to reach goal of conserving wild animals); *Dean Milk Co. v. Cty. of Madison*, 340 U.S. 349, 354-55 (1951) (invalidating requirement that milk for sale be pasteurized within five miles from city because it discriminated

against out-of-state businesses and goal of ensuring safe milk could be achieved by less restrictive alternatives, such as inspection). Where the state regulates neutrally to achieve legitimate state interests, the existence of a less restrictive means will not necessarily invalidate the law.[4] *See Am. Trucking*, 545 U.S. at 436 (rejecting argument that per-truck fee assessment violated dormant Commerce Clause because less restrictive alternatives existed because of costs to state to develop alternative fee structure); *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 195 (1995) (rejecting proposition that State is required to use alternative just because it may be "possible" to do so).

In sum, the first step in the dormant Commerce Clause analysis is whether the law discriminates against out-of-state commerce either on its face or in its purpose or effect. *See Am. Trucking*, 545 U.S. at 433. There is no Commerce Clause violation if the law is non-discriminatory and there is no evidence of impact on interstate commerce. *See id.* at 434-35. If the court finds discrimination, then the law can only be saved if there are no non-discriminatory means of achieving the legitimate state purpose. *See Taylor*, 477 U.S. at 151. If a law regulates even-handedly, but still has an effect on interstate commerce, then the second step of the analysis is whether the burden on interstate commerce is "clearly excessive" compared to the benefits to the local citizens. *Pike*, 397 U.S. at 142. The existence of less restrictive means is relevant to this inquiry, but not dispositive of an otherwise non-discriminatory law. *See Am. Trucking*, 545 U.S. at 436; *Pike*, 397 U.S. at 142.

[4] "[T]he Court never has invalidated a nondiscriminatory state law on the ground that the goal could be achieved through a means that is less burdensome on interstate commerce. The cases where laws have been declared unconstitutional under the dormant commerce clause based on the existence of a less restrictive alternative all involved discrimination." Chemerinsky, *supra,* at 451.

B. The Trial Court Applied Unsubstantiated Factual Assumptions to an Erroneous Legal Standard in Holding that the APCIA Violates the Commerce Clause

The trial court erred in holding that the APCIA violates the Commerce Clause. The mere existence of less restricive alternatives does not invalidate a non-discriminatory law. *See Hughes*, 441 U.S. at 337; *Dean Milk Co.*, 340 U.S. at 354-55. In *Am. Trucking*, the Court rejected the argument that the state's interest could be achieved with a less burdensome alternative, because the Court found no evidence in the record that the law discriminated or placed a burden on interstate commerce. *See* 545 U.S. at 436. Here, the trial court invalidated the APCIA for no other reason than that "the [S]tate could have promoted the same local interests without burdening interstate commerce." *Nat'l. Meat Producers Ass'n.*, No. CV 11-55440 NCA, slip op. at 21. Appellees have failed to demonstrate any evidence in the record that the APCIA discriminates against out-of-state businesses by its terms, purpose, or effect,[5] or that the APCIA places any burden on interstate commerce.[6] Holding, as a matter of law, that a non-discriminatory statute enacted to achieve legitimate state goals[7] violates the Commerce Clause for the sole reason that there are less restrictive alternatives is a departure from Supreme Court precedent.[8] It is an unprecedented infringement on the rights of the states to regulate matters of local concern. The trial court sets an impossibly high legal standard for any state regulation to meet. If the trial court's ruling is allowed to stand, the State would have to demonstrate that any regulation to protect the health, environment, and animal welfare is at least rationally related to the state interest, non-discriminatory, and has *no* burden interstate commerce to survive a

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[5] *See infra* section III.A.
[6] *See infra* section III.B.
[7] Here, the trial court found that the protection of health, the evironment, and animals are all legitimate state public interests. *Nat'l. Meat Producers Ass'n.*, No. CV 11-55440 NCA, slip op. at 19.
[8] Constitutional law scholar, Erwin Chemerinsky, notes that the Court has never struck down non-discrimintory state law solely on the grounds that there were less restrictive alternatives available. Chemerinsky, *supra*, at 451.

Constitutional challenge. Because there is no evidence in the record that the APCIA discriminates against out-of-state businesses by its terms, purpose, or effect, and because New York enacted the APCIA for legitimate state purposes, the trial court erred in voiding the law based solely on the existence of less restrictive means.

III. ALTERNATIVELY, THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE APCIA VIOLATES THE COMMERCE CLAUSE

Alternatively, there are genuine issues of material fact as to whether the APCIA (A) discriminates against interstate commerce in its terms, purpose, or effect, (B) imposes any burden on interstate commerce, (C) imposes a burden that is clearly excessive in relation to legitimate state interests, or (D) could achieve the same goals through less-restrictive means. Threrefore, the trial court erred in granting summary judgment in favor of Appellees.

A. There are Genuine Issues of Material Fact as to Whether the APCIA Discriminates Against Out-of-State Commerce in its Terms, Purpose, or Effect

The trial court erred in granting summary judgment in favor of Appellees was because there are genuine issues of material fact as to whether the APCIA discriminates against out-of-state meat producers. A statute may discriminate against out-of-state businesses by its terms, or by its purpose and/or effect. *See Granholm*, 544 U.S. at 743-74 (2005) (invalidating law that, by definition, allowed only in-state wineries to apply for permit to ship wine directly to consumers); *Or. Waste Sys., Inc.*, 511 U.S. at 96 (invalidating state law that assessed surcharge on disposal of "solid waste generated out of state"); *C & A Carbone, Inc.*, 511 U.S. at 389. In sum, a statute discriminates against interstate commerce where it: creates barriers against out-of-state businesses, prohibits the flow of goods interstate, places added costs on interstate commerce, or distinguishes between in-state and out-of-state companies in the local market. *See Exxon,* 437 U.S. at 126.

Here, the trial court found that the APCIA was neutral on its face, did not place a burden on producers of animal products, and applied evenly to in-state and out-of-state trade in its purpose to reduce overall sales of animal products. *Nat'l. Meat Producers Ass'n.*, No. CV 11-55440 NCA, slip op. at 18. There is no evidence in the record that the APCIA creates barriers or prohibits the flow of interstate goods. There is no evidence in the record that it places additional costs on interstate commerce, unlike the statute in *Oregon Waste Systems*, which charged more for waste produced out-of-state. 511 U.S. at 96. Nor is the APCIA like the ordinance in *C & A Carbone*, which added costs to interstate waste haulers while funneling business to a local private company. *See* 511 U.S. at 389. The APCIA also doesn't distinguish between in-state and out-of-state animal products, unlike the law in *Granholm*, which by its terms allowed only in-state wineries to ship wine directly to consumers, 544 U.S. at 743-74.

However, the trial court found that the APCIA website "advocat[es] the purchase of in state products over the purchase of out of state products." *Nat'l. Meat Producers Ass'n.*, No. CV 11-55440 NCA, slip op. at 19. Even so, the APCIA does not distinguish between in-state and out-of-state products with regard to any benefits, costs, or rights of doing business in New York. Appellees provide no evidence in the record that the sales of any out-of-state farms have decreased, while those of an in-state farm have increased. Nor do Appellees provide evidence that out-of-state farms have incurred increased costs, to the benefit of in-state farms. There are no facts in the record demonstrating that the APCIA has the practical effect of discriminating against out-of state-trade for the benefit of local businesses. Thus, summary judgment was improper because there are genuine issues of material fact as to whether the APCIA is discriminatory.

B. There are Genuine Issues of Material Fact as to Whether the APCIA Imposes any Significant, Practical Burden on Interstate Trade

There are genuine issues of material fact as to whether the APCIA imposes any burden on interstate commerce. If a statute regulates evenly, with no evidence of a "significant practical burden" on interstate commerce, then the statute is a valid exercise of the state's police power. *See Am. Trucking*, 545 U.S. at 434. If, on the other hand, a non-discriminatory statute imposes some incidental burden on interstate commerce, then the court weighs the burden against the state interest. *See Pike*, 397 U.S. at 142. This Court defines "incidental burden" as "burdens on interstate commerce that exceed the burdens on intrastate commerce." *U.S.A. Recycling Inc. v. Town of Babylon*, 66 F. 3d 1272, 1287 (2d Cir. 1995) (citing *Clover Leaf*, 449 U.S. at 471-72). Here, there are no findings of fact as to whether the APCIA imposes any burden on interstate trade in animal products. There's no evidence that the APCIA imposes greater costs on out-of-state producers, unlike in *Pike*, where the appellee-cantaloupe grower demonstrated costs of $900,000 to comply with an Arizona produce law.[9] *See* 397 U.S. at 140. Appellees have not demonstrated any costs or losses of profits to any out-of-state farms associated with the APCIA's website. Nor is there any evidence that the alleged burden on interstate commerce exceeds burdens on intrastate commerce. The single fact that the APCIA website lists only New York farms in insufficient to find, as a matter of law, an impermissible burden on interstate trade. Thus, summary judgment is improper because there are genuine issues of material fact as to whether the APCIA imposes any burden on interstate trade.

[9] The produce company demonstrated imminent loss of crop worth $700,000 and that costs of building a new facility to comply with the law, which standardized the packaging of fruit in intrastate commerce, would be an additional $200,000.

C. There are Genuine Issues of Material Fact as to Whether the Burden on Interstate Commerce, if Any, is Clearly Excessive in Relation to the Benefits of the APCIA

Even assuming that the APCIA imposes a burden on interstate commerce, there are genuine issues of material fact as to whether the burden is "clearly excessive" in relation to the benefits to local citizens. *See Pike*, 397 U.S. at 142. The Court in *Pike* articulated a balancing test: where a nondiscriminatory state law incidentally burdens interstate commerce, it is valid unless the burden is "clearly excessive" compared to the local benefits. *See id.* That the burden on interstate commerce is "clearly excessive" is a high standard to meet. For example, in *Clover Leaf*, the Court upheld a state law prohibiting the use of non-recyclable plastic milk containers, despite finding a disproportionate burden non-local dairy and plastics businesses, because of the "substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems." 449 U.S. at 473. *See also Exxon*, 437 U.S. at 127 ("[I]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.")

Here, the Court must weigh, on the one hand, an utter dearth of evidence demonstrating any burden or inconvenience imposed on any of the members of the NMPA, and, on the other hand, the benefits to consumers armed with better information about animal products. The Committee found that educating consumers about industrial agriculture would reduce consumption of animal products, which would in turn reduce the long-term health care and environmental costs to the state. *Nat'l. Meat Producers Ass'n*, No. CV 11-55440 NCA, slip op. at 3. The substantial factual testimony before the New York legislature and cited by the trial court demonstrates the significant public health risks, costs of mitigating environmental pollution, and animal suffering associated with industrial agriculture. *See id.* at 4-11. There is a strong association between consumption of meat and chronic disease. *Id.* at 5. Additionally,

there are serious infectious disease risks associated with livestock processed for consumption, which can expose consumers to *Salmonella* and *E. coli*. *Id.* at 6. The costs of hospitalization and treatment from *Salmonella* alone are about $2.5 billion per year. *Id.* The incidences of zoonotic diseases have exploded in recent years, all arising from animals confined in agricultural operations. *Id.* at 7.

The Committee also found significant environmental costs associated with industrial animal agriculture. *Id.* at 8-11. The direct and indirect costs of pollution from disposal of manure in concentrated animal feeding operations (CAFOs) are enormous. In New York alone, the cost to mitigate leaching from dairy and hog CAFOs is estimated to result in a $56 million bill to taxpayers. *Id.* at 9. The indirect costs—such as contamination of water sources or decimation of natural resources—can be disastrous also. *See id.*

Finally, the Committee considered the suffering of animals in industrial farming in coming to its conclusion that reducing animal product intake would benefit the public and reduce government costs. As summarized in the affidavit submitted by Dr. Bernard Rollin, animals in the beef, pork, dairy, veal, and poultry industries are subject to a battery of invasive, stressful, and agonizing procedures as a matter of day-to-day practice in the business. *See* Rollin, Aff. 1, 5-7, 10, 16. Beyond the practices of intense confinement, castration, tail docking, and debeaking, *see id.,* animals in factory farms can be subject to horrendous acts of cruelty at the hands of workers.[10] Factory farming engenders antipathy because it treats animals as merely

[10] For example, in 2010, Compassion Over Killing (COK) exposed practices at a California hatchery, releasing video documenting baby chicks still alive but mutilated and trapped in processing machinery. *See* Cheryl Leahy, COK files lawsuit against California hatchery to stop cruel and unlawful practices, Voices of Compassion (Jan. 11, 2012), http://www.cok.net/blog/2012/01/cok-files-lawsuit-against-california-hatchery-stop-cruel-and-unlawful-practices. In December of 2012, undercover investigations by the Humane Society of the United States (HSUS) led to criminal charges of animal cruelty against nine employees of a Wyoming pig farm. *See* HSUS, Nine Charged with Animal Cruelty at Wyoming Pig Farm following The Humane Society of the United States' Undercover Investigation (Dec. 24, 2012),

articles of production. *See* Gaverick Matheny and Cheryl Leahy, Farm Animal Welfare, Legislation, and Trade, 70 WTR Law & Contemp. Probs., 325, 328-32 (2007) (summarizing economic incentives in industrial agriculture against caring for welfare of individual animals).

Studies show that consumers are increasingly concerned with the health risks of consuming meat[11] and the welfare of animals raised for food.[12] However, consumers are also underinformed about animal agriculture practices, with 51% of American consumers reporting that they have little knowledge of farm animal care and practices.[13] Thus, the State not only has a legitimate interest in protecting public health, the environment, and animal welfare, but its citizens are also benefited by the APCIA because it helps them make informed choices that reflect their ethical beliefs.

Against these benefits to the citizens of New York, this Court must balance the purported burden on interstate commerce. In *Clover Leaf*, the state interest in environmental conservation from a ban on nonrecyclable milk containers, an even more restrictive law than the APCIA, outweighed evidence of the burden on the out-of-state plastics industry. 449 U.S. at 473. Even if the APCIA's website, by listing only New York farms, shifts some business from an out-of-state supplier to a New York farm, that is insufficient to find an impermissible burden on

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http://www.humanesociety.org/news/press_releases/2012/12/Wyoming_Premium_charges_122412.html. Undercover video by HSUS documented workers kicking sows, and flipping live piglets in the air. *Id.*

[11] In a 2005 study, 73% of semi-vegetarians (those who do not abstain from meat but have deliberately reduced their meat consumption) listed health reasons as the primary driver in changing their eating habits. Caryn Ginsberg, The Market for Vegetarian Foods, The Vegetarian Resource Group, http://www.vrg.org/nutshell/market.htm#market (last visited Jan. 9, 2013).

[12] According to a 2012 consumer research study, 42% of American consumers say that farm animal welfare is "very important." Report: Animal Tracker, Humane Research Council, 5 (April 2012), http://www.humanespot.org/system/files/Animal+Tracker+-+Wave+5+Topline+Report.pdf. A significant portion of consumers are also willing to pay more for food that is humanely produced. J.C. Swanson and J.A. Mench, Animal Welfare: Consumer Viewpoints, Univ. Cal. Davis (2000), http://animalscience.ucdavis.edu/Avian/swanson.pdf (finding that 44% of Americans would pay 5% more for humanely-raised food, 20% of Americans would pay up to 10% more for humanely-raised food).

[13] American Meat Institute, Laying out the Facts, Humane Research Council (Sept. 9, 2007), http://www.humanespot.org/content/laying-out-facts.

interstate commerce. *See Exxon*, 437 U.S. at 127. The statute upheld in *Exxon*, which prohibited petroleum refiners from operating gas stations in the state, was also much more restrictive than the APCIA. *Id.* at 126. In *Pike*, the Court found that the statute was enacted to protect a legitimate state interest in enhancing the reputation of Arizona fruit and vegetable growers, and maximizing financial return of the local farming industry. 397 U.S. at 143, 146. However, it found that the costs to the California cantaloupe grower challenging the law (over $900,000) clearly outweighed the minimal state interest. *Id.* at 145-46. Here, the state interests of protecting the public health and welfare, decreasing societal costs of diet-related disease and environmental pollution, and addressing animal cruelty are much greater than standardizing a particular practice in order to enhance the reputation of a state industry. *See id.* at 143. Also, unlike the plaintiffs in *Pike*, who demonstrated substantial financial costs from the enforcement of the state law, *id.* at 140, 145, here, Appellees have not demonstrated any cost or impact from Appellant's website. Thus, summary judgment was improper because there are genuine issues of material fact as to whether the purported burden on interstate commerce clearly outweighs the substantial state interests served by the APCIA.

D. There are Genuine Issues of Material Fact as to Whether the State Could Have Enacted Less Restrictive Alternatives to Achieve the Same Goals

There are genuine issues of material fact as to whether the State could achieve its goals using a less restrictive alternative. In balancing the benefits of the law against the burdens on interstate commerce, a court may consider whether less restrictive means could have achieved the same purpose. *Pike*, 397 U.S. at 142. The trial court relied heavily on its findings that New York could have achieved the same goals with a lesser impact in interstate commerce. *Nat'l. Meat Producers Ass'n.*, No. CV 11-55440 NCA, slip op. at 21 ("Since there are other ways in which the state could have promoted the same local interests without burdening interstate

commerce, the New York law is unconstitutional."). Specifically, the trial court found that the State could add the names of farms from other states to the website, it could have not provided the names of any farms, and it could have enacted other legislation to protect public health, farm animal welfare, and the environment. *Id.* at 20. The trial court erred in granting summary judgment in favor of Appellees because each of the proposed alternatives raise genuine issues of material fact as to whether the State could achieve the same goals or whether such means would actually be less restrictive on interstate commerce. Additionally, it is appropriate for this Court to vacate the trial court's decision because the trial court's reasons in granting summary judgment were merely conclusory. *See Hilton*, 673 F. 3d at 126.

1. There are Genuine Issues of Material Fact as to Whether Adding Names of Out-of-State Farms is a Less Restrictive Alternative

First, the trial court dismissed Appellants' argument that adding the names of out-of-state farms would be too costly because the Department of Agriculture and Markets would have to gather information on such farms and analyze them under New York environmental and welfare standards. *Nat'l. Meat Producers Ass'n.*, No. CV 11-55440 NCA, slip op. at 20. However, in *American Trucking*, the Court gave weight to a similar argument by the Michigan Public Service Commission that an alternative fee structure to raise the same revenue as the challenged per-truck fee would require the state to create a burdensome data accumulation system. 545 U.S. at 436 (rejecting argument that nondiscriminatory law was invalid just because less restrictive alternatives were possible). Appellees point to no evidence in the record supporting their claim that analyzing the practices of other farms to include them on the list would result in less of a burden on interstate trade than is currently caused by the website. Appellees have also failed to show that the Department of Agriculture and Markets prohibits out-of-state farms from voluntarily demonstrating that they meet New York's humane and environmental standards.

Thus, summary judgment was improper because there are genuine issues of material fact as to whether adding names of out-of-state farms would be less burdensome on interstate commerce, without being so cost-prohibitive that it would prevent the State from achieving the same goals.

2. There are Genuine Issues of Material Fact as to Whether Not Providing the Names of Any Farms Would Achieve the Same Goals

Second, the trial court dismissed Appellants' argument that not providing any names of environmentally sustainable and humane farms would defeat the purpose of the statute, which is to arm consumers with information to make healthier, more sustainable, and ethical purchasing choices. *Nat'l. Meat Producers Ass'n*, No. CV 11-55440 NCA, slip op. at 20. If the State were merely to provide information about the practices and social costs of animal agriculture, without also providing any information about how consumers can shape their purchasing habits to mitigate these costs, the goals of the statute could not be met. Given consumers' lack of knowledge about farming practices, there is an incentive for manufacturers to make representations about the welfare of animals used in their products that play on consumers' good intentions. *See* American Meat Institute, *supra*. *See also* Carter Dillard, False Advertising, Animals, and Ethical Consumption, 10 Animal L. 25, 26 (2004) ("Because consumers will often pay more for humanely produced goods, and because those goods often cost more to produce, there is an incentive to convince buyers at the point of purchase that goods are created under more animal-friendly conditions than they in fact are.") (citations omitted). False advertising claims related to animal products are demonstrative of the kind of public misinformation regarding animal care standards in industrial agriculture.[14] Because many consumers lack

[14] *See United Egg Producers, Ind.*, NAD Case Rpts. 636, 636 (Dec. 2003), appeal filed (cited in Dillard, *supra* at 61 n.1 (2004)) (finding actual conditions of egg laying hens acceptable under UEP's "Animal Care Certified" program did not comport with what consumers would consider "humane"); *PETA v. Cal. Milk Producers Advisory Bd.*, 125 Cal. App. 4th 871 (2005) (challenging advertising campaign depicting dairy cows grazing in spacious, grassy pastures because it mislead consumers about actual conditions of

knowledge about animal agriculture practices, and there is a significant risk of public misinformation from deceptive advertising, there are genuine issues of material fact as to whether New York could have achieved its goals of helping citizens make informed choices without naming farms that meet its humane and environmental standards.

3. There are Genuine Issues of Material Fact as to Whether Enacting Other Legislation to Meet the State's Goals of Protecting Public Health, the Environment, and Animal Welfare is a Less Restrictive Alternative, or if Other Such Legislation is Feasible

Third, the trial court found that the State could have enacted other legislation to achieve its goals of protecting public health, the environment, and animal welfare. *Nat'l. Meat Producers Ass'n*, No. CV 11-55440 NCA, slip op. at 20-21. There is no evidence in the record that such legislation would either have a less-restrictive effect on interstate commerce or would achieve the State's goals. The record does not even provide any examples of such legislation. In theory, the State could draft legislation requiring certain procedures, such as methods of animal manure disposal, or prohibiting other practices, such as a ban on gestation crates. However, these laws would likely impose a burden on interstate commerce, as out-of-state producers who did not meet these criteria would not be able to market and sell in the state. There are also genuine issues of material fact as to whether such legislation would be feasible. As the trial court noted, the meat industry has a powerful and influential lobbying presence.[15] *Nat'l. Meat*

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dairy cows) (dismissed on procedural grounds); Press Release, Animal Legal Defense Fund, ALDF Sues Hudson Valley Foie Gras (Nov. 13, 2012), http://aldf.org/article.php?id=2216 (alleging foie gras producer's advertising as "the humane choice" is false and misleading because it is impossible for force feeding of ducks to be humane) (complaint filed).

[15] In 2011-2012, agribusiness contributed over $78 million dollars to politicians. OpenSecrets.org, Interest Groups, Center for Responsive Politics (last visited Jan. 5, 2013), www.opensecrets.org/industries/index.php. This lobbying has been successful. Existing legislation protecting animal welfare has no effect on the lives of farm animals because animal agriculture is explicitly exempted from laws such as the federal Animal Welfare Act and many states' criminal animal cruelty laws. *See* Colin Kreuziger, Article, Dismembering the Meat Industry Piece by Piece: The Value of Federalism to Farm Animals, 23 Law & Ineq. 363, 374 (2005). The two key federal statutes governing welfare of farm animals, the Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901—07, and The Twenty-

Producers Ass'n, No. CV 11-55440 NCA, slip op. at 17. In conclusion, there is no evidence in the record demonstrating alternative legislation that the State could adopt to protect public health, the environment, and animal welfare, and there are genuine issues of material fact as to whether any alternative legislation would achieve these goals and have a lesser burden on interstate commerce. Therefore, summary judgment was improper.

CONCLUSION

The New York State legislature acted squarely within its broad authority under the police power in enacting the APCIA to raise public awareness about the impacts of animal agriculture and meat consumption on public health, the environment, and animal welfare. Mitigating the public health and environmental impacts of agriculture costs New York millions of dollars each year. The State found that a reduction in the consumption of meat would greatly reduce these costs. APCIA placards stand as a reminder to citizens of New York of the consequences of their diet choices on their own health, the health of the environment, and the welfare of animals. The FMIA regulates standards for the packaging and labeling of meat products. The goals of the FMIA are to control packaging standards to prevent mislabeling of meat products and to ensure that producers offer wholesome products for sale. The trial court correctly held that the differences between these statutes indicated that Congress did not intend for the FMIA to preempt labels like the APCIA placards. Additionally, this Court could affirm the trial court's holding on alternative grounds that the APCIA placards are not "labeling" under the FMIA.

While the trial court reached the proper conclusion on preemption, it erred in granting summary judgment on Appellees' Commerce Clause claim. Summary judgment is proper where the facts in the record are undisputed, such that a reasonable fact-finder could only find in favor

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Eight Hour Law, 49 U.S.C. § 80502, do not apply to poultry, which represent 98% of farm animals killed each year. Gaverick Matheny and Cheryl Leahy, Farm-Animal Welfare, Legislation, and Trade, 70 WTR Law & Contemp. Probs 325, 335 (2007).

of the moving party. *See In re Publ'n Paper Antitrust Litig.*, 690 F. 3d at 61. Here, summary judgment is improper because there are simply no facts on which a fact-finder could decide in favor of Appellees. There is no evidence in the record that the APCIA discriminates against or burdens out-of-state businesses. Nor is there any evidence in the record that the APCIA's burden on interstate commerce, if any, is clearly excessive in relation to the substantial state interests. Thus, the trial court applied unsubstantiated facts to an erroneously high legal standard in concluding that the APCIA was unconstitutional because New York could accomplish the same goals as the APCIA without burdening interstate commerce. Alternatively, there are genuine issues of material fact as to whether the APCIA violates the Commerce Clause and judgment as a matter of law was improper. Appellants request this Court to reverse the trial court and grant summary judgment in favor of Appellants, or alternatively, reverse and remand for further factual development of this case.

PRAYER FOR RELIEF

For the above reasons, the District Court should be **REVERSED**.

Respectfully submitted,

Team 15
Counsel for Appellant
January 11, 2013