Team #20

No. CV 11-55440 NCA (ABC)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH 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

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BRIEF FOR APPELLEE

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STATEMENT OF ISSUES PRESENTED

1. Does the Federal Meat Inspection Act (FMIA), which expressly prohibits states from imposing labeling requirements that are "in addition to, or different than" the FMIA, preempt New York's Animal Products Consumer Information Act (APCIA), which mandates that all retailers display a sign wherever animal products intended for human consumption are sold but where federal law imposes no such requirement?

2. Does the APCIA violate the Dormant Commerce Clause because its discriminatory in effect and the burden on interstate commerce outweighs the legitimate public interests that it furthers?

STATEMENT OF THE CASE

In 2010, the New York State legislature enacted the Animal Products Consumer Information Act (APCIA) in order to disseminate information to New York consumers about the negative effects of consuming animal products on public health, the environment, and animal welfare. (R. at 3). As a result, the National Meat Producers Association (NMPA) filed an action for declaratory judgment and injunctive relief, claiming that the APCIA violated both the Supremacy Clause and the Dormant Commerce Clause of the United States Constitution. On September 15, 2012, the United States District Court for the Southern District of New York granted the NMPA's motion for summary judgment, finding that the APCIA violated the Commerce Clause. However, the district court rejected the NMPA's argument that the APCIA was preempted by the Federal Meat Inspection Act (FMIA).

On the same day, the New York State Department of Agriculture and Markets and its Commissioner appealed the district court's decision to the Second Circuit Court of Appeals. The opinion for the United States District Court for the Southern District of New York may be found at No. CV 11-55440 (ABC). Jurisdiction is conferred on the Second Circuit to hear this case on appeal by 28 U.S.C. § 1294(1) (2006). This case addresses the constitutionality of a state statute, which the court law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

STATEMENT OF FACTS

The FMIA and Implementing Regulations

The federal government has regulated labeling and inspection of meat products for over a century. In 1906, journalist Upton Sinclair published his famous novel *The Jungle*, documenting in gruesome detail the dark side of Chicago‘s meatpacking industry and sparking public concern over the unsanitary conditions of slaughterhouses nationwide. That same year, Congress responded by enacting the Federal Meat Inspection Act (FMIA). 21 U.S.C. § 601 *et seq*. Since its enactment, the FMIA has sought to protect public health and consumer welfare by assuring that meat food products distributed to them are “wholesome, not adulterated, and properly marked, labeled, and packaged.” *Id.* § 602. To achieve this purpose, the Federal Act and its implementing regulations provide a pervasive set of rules designed to ensure that meat products nationwide comply with uniform labeling and packaging requirements. *Id.* § 603(a).

The FMIA prohibits the distribution in interstate commerce of meat or meat products which are “misbranded” at the time of “sale, transportation, offer for sale or transportation, or receipt for transportation.” *Id.* § 610(c). Meat or meat product is “misbranded” under the Act “if its labeling is false or misleading” or if it fails to comply with any of the detailed labeling requirements set forth in the statute or its implementing regulations. *Id.* § 601(n) (defining “misbranded”); § 607 (setting forth detailed labeling, marking, and container requirements for meat products). All labels on meat food products must receive prior approval before they may be sold in interstate commerce. USDA, *A Guide to Federal Food Labeling Requirements for Meat and Poultry Products* 7 (2007), *available at* http://www.fsis.usda.gov/pdf/labeling_requirements_guide.pdf.

A Comprehensive Set of Federal Regulations

The FMIA authorizes the United States Department of Agriculture (USDA) to regulate the production and labeling of meat products. 21 U.S.C. §§ 601(j), 607. The Food Safety and Inspection Service (FSIS), a sub-agency of the USDA, is charged with enforcing the FMIA. *Id.* § 601. In accordance with its statutory mandate, FSIS has promulgated a comprehensive set of procedures for regulating the labeling and packaging of meat food products. These implementing regulations govern all aspects of how a product is labeled, ranging from the information that a label must contain, 9 C.F.R. § 317.2(c), to the precise placement and prominence of the label, *id.* § 317.2(b),(d), to the exact format in which statements on the label must appear. *See, e.g., id.* § 317.2(h)–(j) (specifying the size and style of lettering, which varies according to the type of information being displayed).

The Animal Products Consumer Information Act

The New York legislature enacted the Animal Products Consumer Information Act (APCIA) in 2010 as a savings measure designed to reduce long-term government costs. (R. at 3). The key feature of the APCIA is its "Labeling Requirement" set forth in section 4 of the Act, which mandates that a public interest warning be "prominently displayed" at all places where animal products intended for human consumption are sold. *Id.* § 1000.4. By enacting the APCIA, the New York legislature sought to encourage its citizens to reduce their consumption of animal products by educating and informing the public about its negative impacts on human health and the environment. The State hoped that this reduced consumption would in turn "reduce the long-term health care and environmental costs to the State." (R. at 3).

The committee tasked with examining potential cost-reduction measures based its recommendations solely on costs associated with health care and environmental impacts. (R. at

3). Accordingly, the public interest warning on the initial required placard stated that

> [m]any 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.

N.Y. Agric. & Mkts. Law § 1000.4. However, based on its subsequent finding that the humane treatment of animals is an "important public interest," the legislature added the following language to the placard's text: "Some animal handling and confinement techniques also lead to animal suffering." (R. at 3).

To obtain additional information about animal agriculture, the placard refers consumers to the following website: www.informedchoice.ny.gov. N.Y. Agric. & Mkts. Law § 1000.3. When consumers visit this website, they are presented with "detailed information on the health effects of consuming animal products and the impact of animal agriculture on the environment and animal suffering." (R. at 4). The website also provides visitors with a list of farms determined by the committee to employ environmentally sustainable practices and humane welfare standards. *Id.* The list of recommended farms is limited to those located within the State of New York. *Id.*

SUMMARY OF THE ARGUMENT

The Animal Products Consumer Information Act (APCIA) is unconstitutional for two separate reasons. First, because it was the "clear and manifest purpose of Congress" under the Federal Meat Inspection Act (FMIA) to preempt state labeling requirements, the APCIA is both expressly and impliedly preempted by the Federal Act. Second, the APCIA violates the Dormant Commerce Clause because it is discriminatory in effect and burdens interstate commerce by promoting only those farms located within the State of New York. If the court finds that the New York statute is unconstitutional on either ground, it must invalidate the APCIA.

Section 678 of the FMIA expressly preempts the APCIA. First, the New York statute falls within the plain language of the express preemption provision of the FMIA. The APCIA's public interest warning falls within the FMIA's definition of "labeling" because it "supplements or explains" the products it relates to and is "designed for use in the distribution and sale" of those products. Moreover, because it penalizes actions permitted by federal law, the APCIA's placard requirement is "in addition to" and "different than" the federal requirements. Furthermore, the legislative history of the FMIA confirms the plain meaning of § 678 and indicates congressional intent to broadly preempt state regulation of labeling requirements. Finally, the APCIA falls outside the scope of the FMIA's savings clause in § 678. For these reasons, the New York statute is expressly preempted by the FMIA.

The FMIA also impliedly preempts the APCIA because the state statute conflicts with and stands as an obstacle to the accomplishment of the purposes and objectives of the Federal Act. Specifically, the New York statute interferes with Congress' objective of promoting uniformity in the labeling of meat products. Moreover, because it interferes with the careful balancing of statutory objectives and goals sought by Congress, New York cannot avoid preemption simply by classifying the APCIA as a consumer protection statute. Because the FMIA both expressly and impliedly preempts the APCIA, the district court's decision regarding preemption should be reversed.

The APCIA also exceeds congressional authority under the Dormant Commerce Clause, the principle implicit in the Commerce Clause of the United States Constitution that prohibits local laws, which place an excessive burden on interstate commerce. By directing consumers to purchase animal products from New York farms, the website referenced in the APCIA's placard requirement is discriminatory in effect and places an incidental burden on interstate commerce.

This incidental burden has a disparate impact on out-of-state producers compared to local producers that is "clearly excessive" in relation to the legitimate interests of protecting health, environment, and animal welfare. Moreover, there are alternative ways in which the New York legislature may pursue the same legitimate public interests with a "lesser impact" on interstate commerce. Accordingly, the district court correctly held that the APCIA violates the Dormant Commerce Clause, and subsequently this part of the district court's decision should be affirmed.

ARGUMENT

I. THE APCIA IS UNCONSTITUTIONAL BECAUSE IT IS BOTH EXPRESSLY AND IMPLIEDLY PREEMPTED BY THE FMIA.

Congress enacted the Federal Meat Inspection Act (FMIA) in 1906 in direct response to public concern over the safety of our nation's meat supply. 21 U.S.C. § 601 *et seq.* (2006). This intent is made explicit in the FMIA's preamble, which states that "[i]t is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat products distributed to them are wholesome, not adulterated, and properly marked, labeled and packaged." *Id.* § 602. To achieve these ambitious objectives, Congress devised a thorough and pervasive statutory scheme for regulating the labeling and packaging of meat products. *Id.* § 607(d). Furthermore, the FMIA authorizes the Secretary of Agriculture to promulgate additional regulations for the labeling of meat products in order to implement the Act. 9 C.F.R. § 300 *et seq*. In order to promote uniformity, Congress expressly prohibited states from imposing "[m]arking, labeling, packaging, or ingredient requirements" which are "in addition to, or different than" those made under the Act. *Id.* § 678.

The Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. Accordingly, this Court has long recognized that "[w]hen the Federal Government acts within the authority it possesses under the Constitution, it

is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes." *City of New York v. F.C.C.*, 486 U.S. 57, 63–64 (1988). This power extends to federal regulations, which have "no less preemptive effect than statutes." *Fidelity Fed. Sav. & Loan Ass'n*, 58 U.S. 141, 153 (1982). Although courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947), a finding of preemption is "compelled" whenever Congress has "unmistakably ordained that its enactments alone are to regulate a part of commerce." *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977) (citations omitted).

A. <u>The APCIA is expressly preempted by the FMIA because it imposes labeling requirements that are "in addition to" or "different than" the federal requirements.</u>

In express preemption cases, the "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–63 (2002) (internal quotation marks omitted). The text of the FMIA's express preemption clause provides that no state may impose "[m]arking, labeling, packaging, or ingredient requirements" which are "in addition to, or different than" those made under the Act. 21 U.S.C. § 678. Therefore, a state law is preempted if it (1) imposes "marking, labeling, packaging or ingredient requirements" that (2) are "in addition to, or different than" the federal requirements. Because the APCIA imposes "labeling" requirements which are "in addition to, or different than" federal labeling requirements within the plain wording of these clauses as found within § 678 of the FMIA, it is expressly preempted by the Federal Act.

1. The APCIA imposes "requirements" within the plain meaning of § 678.

Although the term "requirement" is not defined within the text of the FMIA, in the absence of a statutory definition, courts construe a statutory term "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). "Requirements" are generally defined as: 1) Something that is required; necessity, 2) Something obligatory; prerequisite. American Heritage Dictionary 1050 (2d Coll.Ed.1985). The APCIA states that the Public Interest Warning "*must* be prominently displayed wherever animal products intended for human consumption are offered for sale." N.Y. Agric. & Mkts. Law § 1000.4.1 (emphasis added). Because its language is obligatory, the provisions of the New York statute constitute requirements within the ordinary meaning of the term.

Reading the mandate contained in the APCIA as a "requirement" is also consistent with the Supreme Court's interpretation of the term as used within statutory express preemption provisions. In *Cipollone v. Liggett Group*, for example, the Court held that the definition of requirement "sweeps broadly," and reaches all "requirement[s] or prohibition[s] . . . imposed under State law." 505 U.S. 504, 520–21 (1992). A requirement, unlike an event, which "merely motivates an optional decision," is a "rule of law that must be obeyed." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 432 (2005). Because the APCIA requires that retailers display the public interest warning in accordance with the state law, and imposes a fine of $1,000 per day for non-compliance, N.Y. Agric. & Mkts. Law § 1000.5, the New York statute imposes requirements within the plain meaning of § 678.

2. The APCIA's public interest warning is a "label" because "labeling" has been interpreted broadly and requires neither physical attachment nor concurrent shipment.

Not only does the text of the APCIA itself refer to the placard required by section 4 as a "Labeling Requirement," N.Y. Agric. & Mkts. Law § 1000.4, the placard falls within the FMIA's broad definition of "labeling." The FMIA defines "label" as "a display of written, printed, or graphic matter upon the immediate container (not including package liners) of any article." 21 U.S.C. § 601(o). The term "labeling" is more broadly defined 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) (emphasis added). Thus, the plain language of the statute makes clear that materials need not be physically attached to a product to qualify as labeling for it, so long as they "accompany" it. Therefore, the APCIA's public interest warning constitutes labeling if it "accompanies" the animal products to which it refers.

The Supreme Court has construed the term "accompanying such article" broadly. In *Kordel v. United States*, the Court found that the definition of "labeling" in the Federal Food, Drug, and Cosmetic Act (FDCA)—which is identical to that contained in the FMIA[1]—applied to pamphlets promoting the sale of health products that were distributed to consumers by the vendors of the products. 335 U.S. 345, 346 (1948). Significantly, the Court considered the materials to be labels despite the fact that they were not shipped with the drugs in interstate commerce, but were sent a year and a half after the drugs were sent. *Id.* at 353. Moreover, it was irrelevant to the Court that the booklets had no "physical attachment" to the products. In some cases, the literature was displayed in the stores where the drugs were sold; in others, it was given away, sold independently, or even mailed to customers. *Id.* at 346–47. Nevertheless, the Court

[1] Like the FMIA, the FDCA defined "labeling" as "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 21 U.S.C. § 321(m). The term "label" was defined as "a display of written, printed, or graphic matter upon the immediate container of any article." *Id.* § 321(k).

refused to interpret the phrase "accompanying such article" as limited to materials that are physically attached to it. *Id.* at 350. Instead, because "it is the textual relationship that is significant," the Court held that "[an] article or thing is accompanied by another when it supplements or explains it." *Id.*

Applying a functional definition of the term, the *Kordel* Court held that the pamphlets constituted labeling because they were part of an "integrated distribution" scheme. *Id.* Although the Court acknowledged that Congress did not intend for the FDCA's labeling provisions to regulate advertising in general, the Court found that advertising material nevertheless constitutes "labeling" where it "performs the same function as it would if it were on the article or on the containers or wrappers." *Id.* at 351. Similarly, the Court in *United States v. Urbuteit,* noted that because the FDCA's definition of labeling is a "functional" one, materials explaining an article will be considered "labeling" so long as they are "designed to serve and [do] in fact serve the purposes of labeling." 335 U.S. 355, 357 (1948) (holding that advertising leaflets that followed the shipment of medical devises constituted labels).

Applying *Kordel* and its progeny, courts have repeatedly held that materials need not be directly attached to nor shipped along with a product in order to "accompany" it and therefore be considered "labeling" for a product. For example, as this Court noted in *United States v. Guardian Chemical Corp.*, printed pamphlets or brochures "may be sent out either before or after the article and still 'accompany' it, as long as the distribution of the [article] and the brochures are parts of an 'integrated distribution program.'" 410 F.2d 157, 161 (2d Cir. 1969) (citations omitted). Similarly, the First Circuit explained that "the term 'labeling' must be given a broad meaning to include all literature used in the sale of food and drugs, whether or not it is shipped into interstate commerce along with the article." *V. E. Irons, Inc. v. United States*, 244 F.2d 34,

39 (1st Cir. 1957) (holding that leaflets and copies of newsletters accompanying nutritional supplements constituted "labels").

Because the FMIA's definition of "labeling" was adopted verbatim from the FDCA, S.Rep. No. 90-799 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2188, 2196, the broad interpretation employed by the courts interpreting the FDCA is applicable to the FMIA's definition of the term. *See, e.g.*, *Am. Meat Inst. v. Ball*, 424 F.Supp. 758, 762 ((1976) (stating that, because its definition of "labeling" is based upon the FDCA's, courts "may look for guidance to cases interpreting the identical language of the [FDCA]"). Under this line of reasoning, the placard that retailors must display to comply with the APCIA fits squarely within the FMIA's definition of "labeling." Because it is "the content of the materials, not their physical proximity, that control[s]," *Indian Brand Farms, Inc. v. Novartis Crop Prot. Inc.*, 617 F.3d 207, 216 (3d Cir. 2010), courts have held that "signs, placards, and posters would all be considered labeling" under the Supreme Court's "broad interpretation" of the term. *New York State Rest. Ass'n v. New York City Bd. of Health*, 509 F. Supp. 2d 351, 360 n. 13 (S.D.N.Y. 2007).

In order to comply with the APCIA, the public interest warning must be "prominently displayed" wherever animal products intended for human consumption are sold. N.Y. Agric. & Mkts. Law § 1000.4(1). Moreover, this warning must be "clearly visible" to all customers if such products are displayed in a retail display or vending machine, or if sold in a food service establishment or other public eating place. *Id.* § 1000.4(3), (4). Accordingly, the warning is "designed for use in the distribution and sale" of the product. *Kordel*, 335 U.S. at 350. In addition, because this warning describes the potential impacts that consuming meat products may have on human health, the environment, and animal welfare, it "supplements or explains" those products by giving consumers additional information about them. *Id.* Given the close "textual

relationship" between the public interest warning and the animal products to which it refers, the placard is a "label" within the meaning of the FMIA. *Id.*

3. The APCIA imposes requirements that are "in addition to, or different than" the federal requirements.

The Supreme Court specifically addressed the meaning of § 678 as applied to state labeling and packaging requirements in *Jones v. Rath Packing Co*. 430 U.S. at 525 The Court found that it was the "clear and manifest purpose of Congress" that its enactments alone were to regulate commerce with regard to "labeling" under the FMIA. *Id*. In *Jones*, California's enactment of net-weight labeling laws of meat products that did not account for moisture lost during distribution contradicted federal law, which permitted such deviations. *Id.* at 531–32. According to the Court, the net-weight labeling laws were expressly "different than" the federal requirements and therefore preempted under § 678. *Id.*

As the Supreme Court recognized in *Jones*, the language of § 678 demonstrates congressional intent to preempt state laws that prohibit what the FMIA permits. *Jones*, 430 U.S. at 531. As in *Jones*, the state law in this case makes unlawful actions that nevertheless were made in compliance with federal requirements. Although the FMIA law permits retailers to sell meat products without displaying any type of public interest warning, the APCIA imposes a $1,000 per day fine on all establishments that fail to display the placard set forth in section 5. N.Y. Agric. & Mkts. Law § 1000.5. Accordingly, the APCIA's placard requirement is "in addition to" and "different than" any requirement set forth in the FMIA.

As the Supreme Court explained in *National Meat Association v. Harris*, "[t]he FMIA's preemption clause sweeps widely." 132 S. Ct. 965, 970 (2012). Because § 678 "covers not just conflicting, but also different or additional state requirements," the FMIA prohibits states from imposing requirements "beyond any the FSIS has chosen to adopt." *Id.* at 970–71. Accordingly,

this Court held in *Grocery Manufacturers of America, Inc. v. Gerace* that the FMIA preempted state labeling requirements because they "[did] not comport exactly with the federal specifications." 755 F.2d 993, 1002–03 (2d Cir. 1985); *see also Nat'l Broiler Council v. Voss*, 44 F.3d 740, 746 (9th Cir. 1994) (noting that "in addition to, or different than" effectively means "not identical").

Finally, although the FMIA allows for concurrent state jurisdiction to enforce its requirements, 21 U.S.C. § 678, it does not permit states to enact their own additional requirements. Because this language only applies to adulterated or misbranded articles, which the Act defines as products that fail to conform to federal "definition and standard of identity or composition," *Id.* § 601(n)(7), a state may not prohibit the distribution in commerce of any article that "conforms" to the federal standard. *Armour & Co. v. Ball*, 468 F.2d 76, 84 (6th Cir. 1972); *Voss*, 44 F.3d at 746 (finding preemption under the FMIA and noting that while states may enforce the federal labeling laws, they may not enact their own, additional requirements). Therefore, New York's labeling requirement is "in addition to" and "different than" the FMIA.

4. The legislative history and overall structure of the FMIA confirms the plain meaning of § 678 and indicates congressional intent to broadly preempt state regulation of labeling requirements.

Because "[t]he purpose of Congress is the ultimate touchstone in every preemption case," determining the "scope of a pre-emption statute" requires a determination of congressional intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). An understanding of Congress' intent comes both from the text of the preemption statute and from the "structure and purpose of the statute as a whole," which is revealed not only in the language of the statute itself but also in "the way in which Congress intended the statute and its regulatory scheme to affect business, consumers, and the law." *Id.*

In 1966, the Second Circuit held in *Swift & Co. v. Wickham* that the Poultry Products Inspection Act (PPIA) did not preclude the State of New York from imposing labeling requirements for turkey that were in addition to and different than the federal requirements. 364 F.2d 241, 244 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967). According to the court in *Swift*, nothing in the PPIA suggested congressional intent to displace additional state requirements such as New York's labeling law. *Id*. Notably, neither the FMIA nor the PPIA as originally enacted contained an express preemption provision. However, a year after the Second Circuit issued its decision in *Swift*, Congress amended the FMIA by enacting the Wholesome Meat Act, 81 Stat. 584 (1967), which added the preemptive language identical to that codified in § 678. 21 U.S.C. § 467e (1968). By prohibiting states from imposing any "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under [the Act]," *id*., Congress manifested its intent that the PPIA and the FMIA preempt all state labeling laws.

Moreover, the New York legislature cannot avoid the FMIA's preemption clause simply by framing the APCIA as a consumer protection statute. Because most labeling laws are designed to protect and inform the public, such an interpretation would effectively negate § 678's reference to labeling requirements. *See, e.g*, *Am. Meat Inst. v. Leeman*, 180 Cal. App. 4th 728, 759 (2009) (citations omitted) ("If Congress intended courts to interpret the FMIA's preemption provision to preserve state labeling laws intended to protect or inform consumers, few, if any, state law labeling requirements would be preempted."). To allow states to avoid the FMIA's preemption clause simply by framing the purpose of their statutes in a different way "would make a mockery of the FMIA's preemption provision." *Nat'l Meat Ass'n*, 132 S. Ct. at 973.

5. The scope of § 678's savings clause is not broad enough to encompass the APCIA.

Section 678 provides that, although states may not regulate the labeling or packaging of meat products, the FMIA does not preclude states from "making requirements or taking other action, consistent with this [Act], with respect to any other matters regulated under this [Act]." 21 U.S.C. § 678. Section 678's savings clause cannot be read to encompass the New York statute because such an interpretation would violate traditional principles of statutory interpretation and would render superfluous the provision's explicit reference to "labeling" in § 678.

It is a "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992). Accordingly, a general saving clause will not be interpreted to "supersede the specific substantive pre-emption provision." *Id.* at 385. Because the savings clause in § 678 refers generally to all "other matters," 21 U.S.C. § 678, this case is distinguishable from *Chamber of Commerce of U.S. v. Whiting*, in which the Supreme Court held that an Arizona law was "saved" from preemption. 131 S. Ct. 1968, 1987 (2011). The savings provision at issue in *Whiting* specifically exempts from the Immigration Reform and Control Act's preemption provision all state laws imposing sanctions "through licensing and similar laws." *Id*. at 1975. In contrast, given its lack of specificity, the FMIA's savings clause should not be read to encompass state laws such as New York's, which as discussed in detail above, fall squarely under the "[m]arking, labeling, packaging, or ingredient requirements" language of § 678's preemption provision. Reading the savings clause in § 678 to encompass requirements such as those imposed under the APCIA would render the provision's reference to labeling a nullity.

In conclusion, because the APCIA's public interest warning constitutes "labeling" within the meaning of the FMIA, and because the statute imposes requirements on retailers that are "in addition to, or different than" the labeling required by the FMIA, the New York law as applied to meat products is expressly preempted by the Federal Act.

B. The APCIA is impliedly preempted because it stands as an obstacle to the FMIA.

Because the Supremacy Clause invalidates all state laws that "interfere with or are contrary to, federal law," *Hillsborough County v. Automated Medical Labs., Inc*., 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1 (1824)), Congress' inclusion of an express preemption provision "does not bar the ordinary workings of conflict preemption principles that find implied preemption." *Sprietsma,* 537 U.S. at 65. Implied preemption occurs in two general contexts: (1) when a state legislates in a field that Congress intended to occupy totally and (2) when the state law conflicts with a federal law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

Implied conflict preemption, like express preemption, requires courts to analyze the federal statute as a whole, taking into account its purpose and its intended effects. *Id*. Taking the FMIA's purposes and effects into consideration, the court must next determine "whether a party's compliance with both federal and state requirements is impossible" or whether the state law "poses an obstacle to the accomplishment of Congress's objectives." *Id*. at 373. In making this determination, courts "should not distort federal law to accommodate conflicting state law." *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2580 (2011). Because the New York statute undermines the objectives of the FMIA, the APCIA is impliedly preempted by the Federal Act.

1. The APCIA stands as an obstacle to Congress' objective of promoting uniformity in the labeling of meat products.

Because the APCIA creates a patchwork of conflicting state regulations, the New York

statute interferes with the FMIA's objective of promoting uniformity. The language of the FMIA's preemption clause itself indicates congressional intent to achieve uniformity among the states. By including § 678's preemptive language, Congress "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), that "its enactments alone are to regulate a part of commerce." *Jones*, 430 U.S. at 25. This intent to prescribe uniform standards is further manifested in the FMIA's statement of findings, which provides that "all articles and animals which are regulated under [the Act] are [] interstate commerce" and that the "regulations as contemplated by [the Act] are appropriate to prevent and eliminate burdens upon such commerce [and] to effectively regulate such commerce." 21 U. S.C. § 602. As other courts have recognized, the "need for uniform meat packaging . . . and labeling regulations is strong, lest meat providers be forced to master various separate operating techniques to abide by conflicting state laws." *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326, 334 (5th Cir. 2007).

If this Court finds that the APCIA is not preempted, then each of the fifty states will be allowed to pass laws governing the labeling of meat products, so long as such laws are characterized as consumer protection laws designed merely to regulate the "dissemination of information." N.Y. Agric. & Mkts. Law § 1000.3. Fearing a similar result, the Court in *Rowe v. New Hampshire Motor Transport Association* found that federal law preempted a Maine statute, despite the state's claim that the law would not impose any significant burden upon the carriers to which the law applied. 552 U.S. 364, 373 (2008). Rejecting this argument, the Court noted that Maine's reasoning was "off the mark." *Id*. The Court stated:

> To allow Maine to insist that the carriers provide a special checking system would allow other States to do the same. And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations.

Id. The district court's claim that the "burden of displaying an additional placard where animal products are sold is minimal and with which it is easy to comply," (R. at 15), is similarly off the mark. Regardless of how simple or complex its requirements might be, the APCIA and similar state regulations would undoubtedly stand as an obstacle to the FMIA's objective of uniformity by allowing a patchwork of conflicting state laws governing the labeling of meat products.

2. Because it stands as an obstacle to the objectives of the federal law, it is irrelevant that the APCIA's primary goal is to provide consumers with information.

The APCIA's stated purpose is to "protect the citizens [of New York] 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 district court found that the APCIA falls outside the scope of the FMIA because, unlike the federal law, the purpose of the state statute is simply to provide consumers with information regarding the effects of eating animal products. (R. at 15) (noting that the title of the FMIA "refers specifically to meat *inspection*, rather than a more comprehensive scheme of regulating information on meat").

However, the Supreme Court rejected a similar argument in *National Meat Association v. Harris* by refusing to read the scope of the FMIA so narrowly. In that case, the State of California claimed that the state law avoided the FMIA's scope because it was "designed to ensure the humane treatment of pigs, rather than the safety of meat." *Nat'l Meat Ass'n*, 132 S. Ct. at 974. According to the Court, such a narrow interpretation fundamentally "misunderstands" the scope of the FMIA, which is not limited to inspection or food safety but addresses matters such as humane treatment as well. *Id*. In addition, Congress expressly stated that the FMIA is concerned not only with inspection, but with effectively regulating meat products in interstate

commerce. 21 U.S.C. § 602 (providing that misbranded meat products "impair the effective regulation of meat and meat food products in interstate or foreign commerce").

Moreover, courts have repeatedly recognized that federal labeling requirements generally serve a variety of important purposes. For example, in *Federal Security Administrator v. Quaker Oats Co.*, the Supreme Court noted that the purpose of the FDCA was not only to ensure "truthful and informative labeling," but also to "protect the consumer from 'economic adulteration[,]' by which less expensive ingredients were substituted . . . so as to make the product . . . inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold." 318 U.S. 218, 230 (1943). Applying this rationale to the labeling of meat products, the Sixth Circuit held that the purpose of the FMIA was "not merely to prevent false and misleading labeling but to set standards under which the integrity of meat food products would be assured." *Armour*, 468 F.2d at 81.

Finally, the APCIA interferes with the careful balance Congress sought to achieve by enacting the FMIA. A state statute "stands as an obstacle" to the implementation of federal law "if it interferes with the methods by which the federal statute was designed to reach this goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, (1987) (citations omitted). Accordingly, the Supreme Court in *Buckman Co. v. Plaintiffs' Legal Comm*. found conflict preemption "stem[ming] from the fact that the federal statutory scheme amply empowers [the federal agency]" to accomplish the federal objectives, and that this authority is used "to achieve a somewhat delicate balance of statutory objectives." 531 U.S. 341, 348 (2001). Like the federal scheme in *Buckman*, the FMIA expressly authorizes the Secretary to regulate the labeling of meat products in a manner that achieves a balance between the FMIA's sometimes competing objectives of protecting public health and effectively regulating commerce. 21 U.S.C. § 602

("[R]egulation by the Secretary . . . is appropriate to prevent and eliminate burdens upon [] commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers."). Because the APCIA interferes with this delicate balance of statutory objectives, it conflicts with—and is therefore impliedly preempted by—the FMIA.

Although the APCIA is preempted by the FMIA, there are alternative avenues by which New York may influence the labeling of animal products. First, nothing in the FMIA precludes the State of New York from enforcing the federal requirements; Congress provided for concurrent jurisdiction to enforce the provisions of the FMIA. 21 U.S.C. § 678. In addition, if dissatisfied with federal law, New York may petition FSIS or ask Congress to change current federal labeling laws and regulations. *Rowe*, 552 U.S. at 376–77 (stating that a state may, if necessary, "seek appropriate federal regulation"). However, although New York's desire to protect the health of its citizens and to promote animal welfare is noble, "in view of the clear and complete preemption ordained by Congress, this Court must enforce the Supremacy Clause," *Armour*, 468 F.2d at 85, and hold that the FMIA preempts the APCIA.

II. THE APCIA IS UNCONSTITUTIONAL BECAUSE IT EXCEEDS CONGRESSIONAL AUTHORTIY UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Article I of the United States Constitution provides Congress with the power "to regulate Commerce . . . among the several states." U.S. Const. art I. § 8, cl. 3. In addition to this express grant of power, courts have interpreted the Commerce Clause to include "implicit restraint on state authority." *United Haulers Ass'n Inc. v. Onedia-Herkimer Solid Waste Mgmt Auth.*, 550 U.S. 330, 338 (2007). This "implicit restraint on state authority" is commonly referred to as the Dormant Commerce Clause, *id.*, and is based on the theory that "the people of the several states must sink or swim together." *Am. Trucking Ass'n, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S.

429, 433 (2005) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). Furthermore, the Dormant Commerce Clause "prevents a [s]tate from 'jeopardizing the welfare of the Nation as a whole.'" *Id.* (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)). "The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests." *C And A Carbone Inc. v. Town of Clarkstown NY*, 511 U.S. 383, 393 (1994).

A statute may violate the Dormant Commerce Clause in one of three ways. First, a statute may "clearly discriminate against interstate commerce in favor of intrastate commerce." *Freedom Holders, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004)). A law is discriminatory when it explicitly favors in-state commerce at the expense of out-of-state commerce. *United Haulers*, 550 U.S. at 338 (citing *Oregon Waste Sys, Inc. v. Dep't of Envtl Quality of Oregon*, 511 U.S. 93, 99 (1994)). Second, a law that is even-handed may violate the Dormant Commerce Clause if it "imposes a burden on interstate commerce incommensurate with the local benefits secured." *Freedom Holders*, 357 F.3d at 216. Finally, a statute may violate the Dormant Commerce Clause if it "has the practical effect of 'extraterritorial control' of commerce occurring entirely outside the boundaries of the state in question." *Id.* In each of these three categories, "the critical consideration is the overall effect of the statute on both local and interstate activity." *American Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003).

In this case, because the APCIA's labeling requirement affects animal products sold at retailers located within the state of New York, regardless of where the animal product originated, the statute makes no attempt to secure extraterritorial control over animal producers outside the State.[2] However, the APCIA is invalid under the Dormant Commerce Clause because it is

[2] *Cf. Healy v. Beer Inst., Inc.*. 491 U.S. 324, 336 (1999) (holding unconstitutional a Connecticut law that required beer companies to post their prices and affirm that they were not higher than in neighboring states as an attempt at

discriminatory in effect and in the alternative, the APCIA has placed a "clearly excessive" burden on interstate commerce in relation to the legitimate public interests is attempts to further.

A. The APCIA violates the Dormant Commerce Clause because it discriminates against out-of-state producers in favor of local producers.

In contrast to the district court's assertion, the APCIA is per se invalid under the Dormant Commerce Clause because it "imposes [a] commercial barrier[] or discriminate[s] against an article of commerce by reason of its origin or destination out of State." *C and A Carbone,* 511 U.S. at 390. Violations of the Dormant Commerce Clause are not limited to only those laws that are facially discriminatory. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977). A law can be facially neutral but still discriminatory in effect if there is proof of a discriminatory impact. *Id.* Furthermore, a law is no less discriminatory simply because in-state producers are also covered under the law. *C And A Carbone,* 511 U.S. at 391.

In *Hunt*, the Court struck down a North Carolina statute that required all apples sold or shipped in North Carolina in closed containers be labeled with only the federal grade. *Hunt,* 432 U.S. at 335. On its face, the Court noted that the statute appeared to apply equally to interstate and intrastate growers and dealers. *Id.* at 349. However, the Court recognized that the law was nevertheless discriminatory in effect in three ways: 1) it increased the cost of doing business in North Carolina for Washington growers and dealers, while leaving North Carolina businesses unaffected; 2) it nullified Washington's trusted and expensive grading system; and 3) it had a leveling effect that worked in favor of local growers and dealers. *Id.*at 351.

The Southern District of New York correctly recognizes that the APCIA is not discriminatory on its face. (R. at 18). The information on the placard required in section 4 must be displayed wherever animal products intended for human consumption are sold in New York,

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extraterritorial control).

irrespective of the origin of those products. N.Y. Agric. & Mkts. Law § 1000.4. The last sentence of the public interest warning reads as follows: "For more information, visit www.informedchoice.ny.gov." *Id.* § 1000.3. Once a consumer visits the website, they are presented with information relating to the consumption of animal products. For example, the website provides "detailed information on the health effects of consuming animal products and the impact of animal agriculture on the environment and animal suffering." (R. at 4). Additionally, the website provides "a list of farms that New York determined were environmentally sustainable and employed humane welfare standards." *Id.*

However, this list only includes environmentally sustainable and humane farms located within the state of New York. Therefore, the APCIA has a discriminatory impact on interstate commerce that is similar to that found in *Hunt*. First, it causes other states to unnecessarily lose business to New York producers; second, it gives an unfair economic advantage to New York producers over out-of-state producers; and finally, it creates the perception that out-of-state producers are not utilizing similar environmental and humane farming practices. In effect, the APCIA is encouraging consumers to purchase animal products from in-state producers at the expense of out-of-state producers. Accordingly, the APCIA is discriminatory in effect and thus unconstitutional under the Dormant Commerce Clause.

B. <u>The APCIA violates the Dormant Commerce Clause because it places an excessive incidental burden on interstate commerce.</u>

Even if this Court finds that the APCIA is not discriminatory, the APCIA violates the Dormant Commerce Clause because it places an excessive burden on interstate commerce. In *Pike v. Bruce Church, Inc.*, the Supreme Court stated that an even-handed statute, which furthers legitimate public interests and imposes only an incidental burden on interstate commerce, "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the

putative local benefits." 397 U.S. 137, 142 (1970). When a legitimate public interest is found, "the question then becomes one of degree." *Id.*

In order to determine whether a state statute is overly burdensome in relation to the local benefits it procures, the Second Circuit applies the *Pike* balancing test. *American Booksellers,* 342 F.3d at 102. Under this test, the court considers three separate factors: "(1) the nature of the local benefits advanced by the statute; (2) the burden placed on interstate commerce by the statute; and (3) whether the burden is 'clearly excessive' when weighed against these local benefits." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005).

1. The APCIA furthers legitimate public interests.

The National Meat Producers Association (NMPA) does not dispute that the APCIA furthers legitimate public interests. The threshold for finding a public interest legitimate is relatively low. *See, e.g., Pike,* 397 U.S. at 145 (holding that a state's desire to protect and enhance the reputation of its produce growers was a legitimate public interest). In this case, the New York statue furthers the protection of public health. N.Y. Agric. & Mkts. Law § 1000.3. It is beyond dispute that the protection of public health is often a state's highest concern. *See Medtronic,* 518 U.S. at 475 (holding that public health and safety are historically matters of local concern). Second, the APCIA furthers the protection of the environment, N.Y. Agric. & Mkts. Law § 1000.3, which courts have also recognized to be a legitimate public benefit. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 699 (1999). Third, the APCIA furthers the protection of animals from cruelty. N.Y. Agric. & Mkts. Law § 1000.3. As the district court noted in its opinion, (R. at 19), animal cruelty is also recognized as a legitimate public interest. *U.S. v. Stevens*, 130 S.Ct. 1577, 1585 (2010). Therefore, it is clear that the APCIA furthers legitimate public interests recognized by the Court.

2. The APCIA places a burden on out-of-state producers that differs from any burden placed on local producers.

A statute is unconstitutional under the *Pike* balancing approach if it "impose[s] a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Freedom Holdings,* 357 F.3d at 217. For example, the Second Circuit in *USA Recycling v. Town of Babylon*, held that a town's takeover of a local commercial garbage market did not impose any different burden on interstate garbage haulers than it did on local garbage haulers, and therefore did not burden interstate commerce. 66 F.2d 1272, 1287 (2d Cir. 1995).

By contrast, the APCIA places a burden on out-of-state producers of animal products that strictly applies to out-of-state produces, but does not impact local producers. On its face, the APCIA regulates both in-state and out-of-state on an even playing field; the labeling requirement is designed to reduce the sale of animal products both from interstate and local producers. (R. at 3) (providing that the goal of the statute was to "encourage the reduction of the public's consumption of animal products"). However, because the placard includes a website that provides consumers with all of the information they need to buy animal products strictly from producers within the State of New York, the APCIA places a heavy burden on interstate commerce. Unlike *USA Recycling*, the APCIA places a clear burden on interstate commerce that has no negative bearing on local commerce. This in turn creates "separable economic units," which is precisely what the Framers sought to prevent when they "granted Congress plenary authority over interstate commerce." *Oregon Waste Sys, Inc. v. Dept. of Envtl Quality of State of Oregon*, 511 U.S. 93, 99 (1994).

3. The disparate impact the APCIA places on interstate commerce is "clearly excessive" in relation to the putative local benefits.

Once it has been established that a state law furthers legitimate public interests and burdens interstate commerce as a result, the court must next determine if the incidental burden on interstate commerce outweighs the legitimate public interests furthered by the statute. *Grand River*, 425 F.3d at 169. The Second Circuit has determined that a state law may be "clearly excessive," and thus overly burdensome in violation of the Dormant Commerce Clause, if it: (1) regulates with a disparate impact on any non-local commercial entity; (2) regulates commercial activity wholly beyond the state's border; or (3) imposes a regulatory requirement inconsistent with those of other states. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 50 (2d Cir. 2007).

The second two categories discussed by the Second Circuit in *Southhold* do not apply in this case. As the district court explained, the APCIA does not regulate out-of-state commercial activity because it does not require retailers outside of New York to place the placard where animal products are sold. (R. at 18). Therefore, from a regulatory standpoint, the statute's placard placement requirement has no impact on out-of-state producers. Similarly, the NMPA does not contend that the New York statute conflicts with regulatory laws to which producers of animal products would be subject to in other jurisdictions. However, because it has a disparate impact on non-local commercial entities, the APCIA falls within the first category identified in *Southold.* Because the website directed to by the placard required in section 4 of the APCIA "favor[s], in a blatantly protectionist manner . . . local [businesses] to the detriment of all others," *Brown & Williamson Tobacco*, 320 F.3d 200, 210 (2d Cir. 2003) (citing *C And A Carbone*, 511 U.S. at 391), the statute places a burden on interstate commerce that is "clearly excessive" in relation to the legitimate public interests it serves.

In *Pike*, an Arizona statute required that cantaloupes grown in the state and offered for sale had to be packed within Arizona. *Pike*, 397 U.S. at 138. In accordance with the statute, the state sought to prohibit a cantaloupe farming operation from transporting uncrated cantaloupes out of the state for packing and processing. *Id*. In order to abide by the regulation, the cantaloupe grower would have had to build a $200,000 operation to package the cantaloupes in the State of Arizona. *Id.* at 144. Therefore, although the Court recognized Arizona's legitimate economic interest in promoting the reputation of produce growers within the state, it struck down the law as unconstitutional on the grounds that the burden on interstate commerce was clearly excessive in relation to this public benefit. *Id.*

By contrast, in *Brown and Williamson Tobacco*, the Second Circuit upheld a New York law that prohibited the shipping or transporting of cigarettes directly to New York consumers. *Williamson Tobacco*, 320 F.3d at 204. The Second Circuit held that a statute regulating the importation and sale of cigarettes did not have a disparate impact on out-of-state cigarette manufacturers that was "clearly excessive" in relation to legitimate public benefits because it only prohibited one method for selling cigarettes to New York consumers. *Id.* at 217. Further, the court held that the statute neither isolated New York from the national cigarette market nor "obstruct[ed] or impede[d] the flow of cigarettes into New York." *Id.*

Although the public benefits that the APCIA seeks to promote have been recognized as legitimate interests, by listing only New York farms on the website referenced in the required label, the statute has a disparate impact on out-of-state producers that is "clearly excessive" in relation to its local benefits. As in *Pike*, out-of-state producers who traditionally sell animal products inside the State of New York are likely to experience a costly reduction in sales as a result of New York consumers purchasing heavily from environmentally sustainable and humane

farms listed on the website found on the required label. In *Pike*, the out-of-state producers still had an avenue—albeit a costly one—to meet the requirements of the Arizona statute if they did not want to lose Arizona cantaloupe sales and the Court still found the statute's incidental burden "clearly excessive." *Pike*, 397 U.S. at 144. Out-of-state producers—even those who employ similar environmental and humane practices as New York farms—are penalized without recourse simply because they are not located within the State of New York.

Moreover, the current case is distinguishable from *Brown and Williamson Tobacco*, in which the Court found that the disparate impact on interstate commerce was not "clearly excessive" in relation to the local putative benefits of public health and safety. *Williamson Tobacco*, 320 F.3d at 217. In *Williamson Tobacco*, the state law simply removed one small avenue through which New York customers could acquire out-of-state cigarettes. *Id.* at 214. Consumers could still easily purchase cigarettes imported by out-of-state markets through any licensed distributor of cigarettes. *Id.* Therefore, according to the court the law had virtually no impact on the national market, nor did the statute impede the flow of interstate commerce. *Id.*

The APCIA, in contrast, both affects the national market and impedes the free flow of interstate commerce. The placard must be displayed at all establishments where animal products are sold, which indirectly dissuades New York consumers from purchasing animal products from other states. As a result, out-of-state producers face a loss of profits and are therefore likely discouraged from importing animal products into New York markets. Therefore, the free flow of animal products between New York consumers and out-of-state producers is effectively stifled, which in turn affects the national market for animal products as a whole. Accordingly, New York's failure to list out-of-state producers on the website listed on the required placard is "clearly excessive" in relation to the legitimate interests perpetuated by the APCIA.

4. New York has numerous other ways to promote the same legitimate interests with a "lesser impact" on interstate activities.

As the Supreme Court noted in *Pike*, "the extent of the burden [on interstate commerce] 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." *Pike*, 397 U.S. at 142. As demonstrated above, the burden the APCIA imposes by solely encouraging the purchase of products produced locally at the expense of out-of-state producers outweighs the local putative benefits. Because there are a number of less restrictive alternatives by which the New York legislature could promote the same legitimate public interests, the APCIA fails under the *Pike* balancing test.

The district court sets forth several ways in which New York could promote the same legitimate interests effectuated in the current statute but with a "lesser impact" on interstate activities. First, the State could add farms located outside the state of New York, which practice environmentally sustainable and humane methods, to its list of recommended farms. (R. at 20). Although more costly and time-consuming, this option avoids the excessive disparate impact on interstate commerce that causes the current statute to run afoul of the Dormant Commerce Clause. Moreover, as the district court suggests, the State could remove the list of recommended farms altogether. *Id.* By simply encouraging consumers to conduct their own research into which farms adhere to sustainable and humane practices, the State could leave both out-of-state farm options, as well as local farm practices, open to public scrutiny. Finally, the State could enact wholly different legislation to achieve the same public interests articulated in the statute with no bearing on interstate commerce, such as banning the use of certain antibiotics in local Concentrated Animal Feeding Operations (CAFOs), (R. at 6), or outlawing particularly egregious CAFO practices such as gestation crates and battery cages (R. at 8, 21) (demonstrating

that such practices negatively affect human health and animal welfare).

The APCIA is first and foremost discriminatory in effect. However, even if this Court believes that the APCIA is not discriminatory, the law also places a heavy burden on interstate commerce that is "clearly excessive" in relation to the legitimate public interests it furthers. Additionally, various other avenues are available to perpetuate the same interests with a "lesser impact" on interstate commerce. On either ground, the APCIA should be struck down as a violation of the Dormant Commerce Clause.

CONCLUSION

For the foregoing reasons, the order of the United States District Court for the Southern District of New York should be affirmed.