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State Regulation of Food Additives and Chemicals:

Preemption, the Commerce Clause, and the Breadth of State Authority

December 2025

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Acknowledgements

This report developed out of a memorandum originally commissioned by the Center for Science in the Public Interest (CSPI) in spring 2025. With the support of CSPI, the research was then expanded into this full report. Thank you to CSPI for input and support throughout the development of this report, and to Environmental Working Group (EWG) for background research which supported this memorandum.

About the Harvard Law School Food Law and Policy Clinic

The Harvard Law School Food Law and Policy Clinic (FLPC) serves partner organizations and communities by providing guidance on cutting-edge food system legal and policy issues, while engaging law students in the practice of food law and policy. FLPC focuses on increasing access to healthy foods; supporting sustainable food production and food systems; and reducing waste of healthy, wholesome food. For more information, visit chlpi.org/flpc.

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I. INTRODUCTION

In 2025, more than 30 states introduced nearly 120 pieces of legislation aimed at curtailing the use of additives in foods.[1] These state bills propose several different mechanisms to reduce the use of harmful additives. Some remove harmful chemical additives from the food system, some ban synthetic color additives or other additives of concern from school meals, some take steps to strengthen state oversight of substances added to processed foods that do not go through the additive approval process but are used because a company believes they are "generally recognized as safe," and lastly others utilize labeling to alert consumers to the presence of concerning additives in food products.

Prior to 2025, state bills on these topics were relatively rare. In recent years, California banned four substances from food via the 2023 California Food Safety Act and banned the use of synthetic color dyes in schools via the 2024 California School Food Safety Act.[2] Yet very few other states introduced or passed similar bills until 2025.

This report analyzes how federal preemption may impact state bills addressing chemical safety in food. The report focuses on four types of common state bills seen in this year's legislation. Two types of bills mirror the California Food Safety Act and School Food Safety Act, and the other two would require warning labels on foods with certain additives, or require disclosure to the state of foods using substances that were determined "generally recognized as safe" without government oversight.

As laid out in more detail below, bills that ban specific additives generally as well as bills that ban certain additives or color dyes in schools[3] are not preempted by the

federal Food, Drug, and Cosmetic Act ("FDCA"), and based on our analysis, there are no implied preemption issues. Likewise, such laws would not run afoul of the Commerce Clause.

The requirement that companies disclose to the state the use of substances in food that have been independently determined as GRAS also is unlikely to be expressly preempted by the FDCA, nor impliedly preempted, as FDA does not maintain a comprehensive public database of GRAS substances.[4] This notification requirement also likely would not violate the Commerce Clause.

State bills proposing to require warning labels on foods with certain additives raise more complicated preemption issues. For example, required labeling on foods that include meat or poultry and thus are regulated by the US Department of Agriculture (rather than by the Food and Drug Administration, which regulates all other foods) may face preemption. These warning label laws may also have to overcome an implied conflict challenge, if they require warning labels on foods that the federal government has otherwise said are healthy.

Part II of this report will talk more about the background rationale for states to take action on additives and will describe in more detail the four categories of state laws analyzed in the report. Part III of this memorandum will provide a preemption analysis for each of category of legislation in turn. Part IV will follow with a relevant constitutional analysis, assessing how the dormant commerce clause will interact with each type of bill.

II. BACKGROUND

States have introduced a large number of bills aiming to increase safety and health of additives used in foods. While some of these bills have now died, many are still active. As of November 2025, seventeen of the bills or resolutions have been enacted.[5] There are four key categories of bills analyzed in this report:

First, there have been a large number of **proposed bills that aim to prohibit the manufacturing, distribution, and sale of food products containing certain specified food additives and colors**, including two enacted in Arkansas and West Virginia.[6] While each state has targeted different additives in its proposed legislation, the list of additives covered across all relevant states includes brominated vegetable oil (BVO) (CAS no. 8016-94-2), potassium bromate (CAS no. 7758-01-2), propylparaben (CAS no. 94-13-3), titanium dioxide, butylated hydroxyanisole, azodicarbonamide, and the following color dyes: FD&C Red No. 3 (CAS no. 16423-69-0), FD&C Red Dye No. 40, FD&C Yellow Dye No. 5, FD&C Yellow Dye No. 6, FD&C Blue Dye No. 1, FD&C Blue Dye No. 2. FD&C Green Dye No. 3.[7]

Second, there have been a number of **bills proposing to restrict or ban offering in school of foods with additives of concern**. Several bills aim to prohibit the sale of foods containing certain synthetic colors or other additives in schools, specifically FD&C Red No. 3, FD&C Red No. 40, FD&C Blue No. 1, FD&C Blue No. 2, FD&C Green No. 3, FD&C Yellow No. 5, and FD&C Yellow No. 6, or other chemicals listed above including potassium bromate, propylparaben, titanium dioxide and BVO.[8] A related category of bills from states such as Arizona (enacted), Texas, and California (enacted) aim to ban the sale of ultra-processed

foods (UPFs) in schools;[9] UPF is defined differently in all states with relevant proposed legislation, though in many states it is tied specifically to the inclusion of certain additives of concern. Proposed school food bans also differ across states in terms of what school foods are covered—whether all foods or just reimbursable meals.[10]

Third, several states—notably New York, New Jersey, and Pennsylvania—have **introduced bills that would require companies to report to the state** when they use substances in food that they have deemed Generally Recognized as Safe ("GRAS") without notifying FDA; such substances would be listed in a publicly available database (GRAS listing).[11]

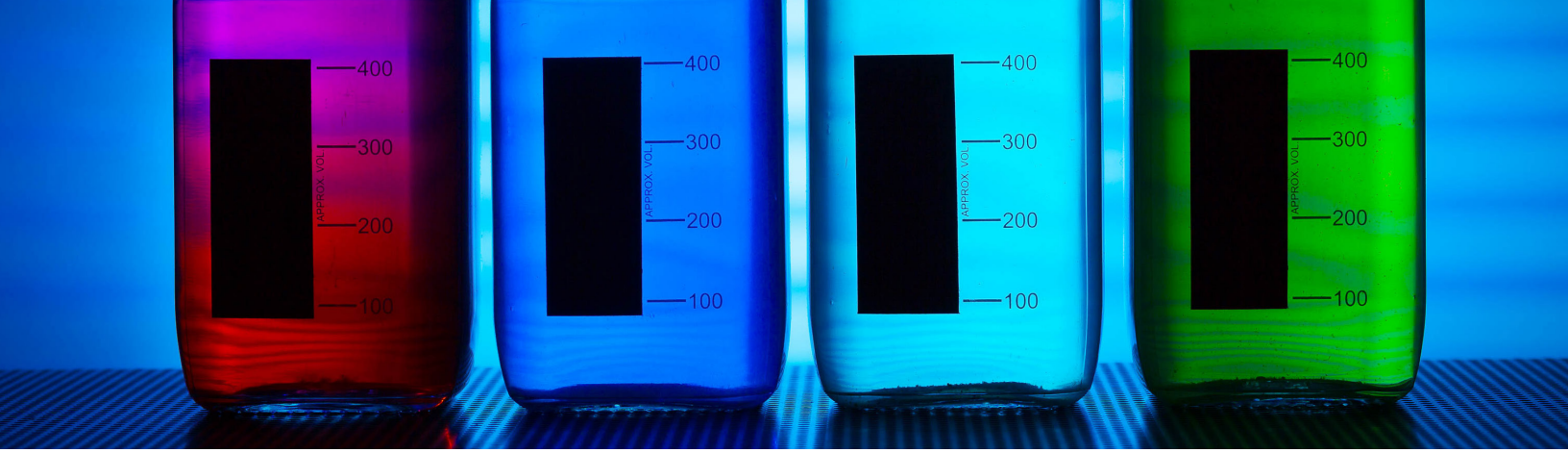
The fourth category covers **bills introduced or enacted that would require warning labels on foods containing specific food additives and artificial dyes**. Several states—have introduced or enacted legislation requiring specific warning labels, such as Florida, Louisiana (enacted), Missouri, Pennsylvania, Texas (enacted), and Wisconsin.[12] These bills target a range of different additives and color dyes and differ based on the language to be included in the relevant warning labels.

There are additional miscellaneous bills that also aim to address chemical safety. For instance, several states have proposed Make America Healthy Again ("MAHA") Commissions or other state nutrition commissions to study a range of topics, including additives.[13] MAHA commissions are not analyzed in detail below, as they are likely not preempted and do not pose any federal constitutional problems.[14]

The state policy approaches described in this report are responding to the inadequacy of federal policy making concerning food safety for chemicals in food. The U.S. Food and Drug Administration ("FDA") oversees additives and ingredients in foods, and both its pre- and post-market systems for additive safety have been subject to widespread criticism.[15] According to these critiques, despite FDA's mandate to protect public health by assuring "safety, efficacy, and security of… our nation's food supply,"[16] FDA lacks a comprehensive, functional additive approval system, and does not take adequate post market enforcement action when safety concerns arise.[17]

First, in terms of premarket safety, FDA has a formal petition process for additives, whereby no additives are allowed in foods without a specific regulation permitting them.[18] This process was created under the Food Additives Amendment to the FDCA, which was enacted by Congress in 1958.[19] However, the vast majority of substances in foods today are introduced through an exemption to the additive definition, which exempts substances that are "generally recognized as safe" (GRAS) from the additive definition and thus from that process.[20] Instead, FDA utilizes a voluntary notification process for GRAS substances. Since the notification is voluntary, manufacturers can also opt out from the voluntary process and can self-declare a substance GRAS without notifying FDA. This has transformed into a pervasive loophole that allows a significant number of additives to escape any regulatory review or oversight from the FDA.

Several states that have introduced a GRAS disclosure requirement aim to partially address the premarket gap in FDA's process by requiring notification of the use of GRAS substances at the state level.[21] These state bills would require a manufacturer to disclose to the state if a food sold in the state uses a GRAS substance that did not go through the voluntary notification process with FDA. While such bills do not require a review of GRAS substances before they enter the market,[22] they allow for more transparency, and, paired with the authority states have to ban certain additives (as described in more detail below), would allow states to take action for any substances of concern.



Many of the proposed state bills would address color additives, which go through a different review process from additives or GRAS substances.[23] Color additives must first be permitted via a "listing regulation."[24] They then have to be certified by the FDA before they are used in foods.[25] Certification means that "FDA chemists have analyzed a sample from the batch and have found that it meets the requirements for composition and purity stated in the regulation—called a 'listing regulation'—for that color additive."[26] FDA tests and verifies each batch before it is used in products and gives the batch a unique lot number that allows the color to be used in FDA regulated products.[27] Some colors, generally those derived from plants and minerals, are exempt from certification.[28]

Turning to post market enforcement, FDA has been criticized for being slow to reassess the safety of additives, GRAS substances, or color additives that are already in use in the food system. For example, FDA banned FD&C Red No. 3 from cosmetics and topical drugs in 1990 because it found that it caused cancer when ingested by laboratory rats.[29] However, it took the agency another 30 years to assess and ban it in foods (action it took in early 2025), and this ban will still not go into effect until 2027.[30] It should also be noted that this ban of FD&C Red No. 3 was spurred in part by the passage of the California Food Safety Act, which banned particular unsafe chemicals that the FDA failed to regulate or enforce like FD&C Red No. 3.[31]

States are working to remove some of these substances on an ad hoc basis through the first two types of state policies mentioned above: removing specific additives and colors from the general food supply and limiting children's exposures to synthetic dyes and other additives by banning these substances in school foods. The warning labels proposed in several states also likely will pressure manufacturers to reformulate products to avoid certain labels. They also make it easier to identify products with additives of concern and assess the cumulative amount of such substances in the food supply.

In response to these bans, we have already seen the Federal government take more action on this issue. FDA may be in the process of addressing some of these systemic failures. On March 10, 2025, Secretary of Health and Human Services Robert F. Kennedy issued a directive to FDA to explore rulemaking to eliminate the self-GRAS loophole.[32] Robert F. Kennedy also commented that FDA plans to phase out eight petroleum based food dyes by the end of 2026. [33] While there is not yet any proposed regulation or official action on this topic, FDA Commissioner Marty Makary committed that FDA would establish a new standard and timeline for industry, revoke authorization for dyes not currently in production, and begin removing dyes from the market.[34] If formalized, such federal action will eventually moot the state bills that apply to color dyes.

III. PREEMPTION ANALYSIS FOR THE FOUR CATEGORIES OF STATE BILLS

As described in this Section, states will likely not be expressly preempted from restricting food additives allowed by the FDA, prohibiting the sale of foods with certain synthetic colors or other additives in schools, or requiring notice for GRAS substances used in their products. States are also unlikely to be preempted from passing laws requiring warning labels for foods with listed additives, but there are potential conflict preemption issues that may arise from this category of law depending on the type of food product and the relevant statutory authority.

Federal preemption doctrine arises from the Supremacy Clause of the Constitution, which provides that federal law is "the supreme Law of the Land" when in conflict with contrary state law.[35] State laws may be preempted explicitly (e.g., where federal statutory language includes a preemption clause) or implicitly (e.g., where a uniquely federal interest can be inferred). However, there are very few areas where federal law completely supplants state law in the same area of regulation, particularly where state law falls within the state's Tenth Amendment "police power" to legislate for the public health, safety, and welfare.[36] Courts recognize three circumstances in which federal law may preempt state law:

> ***First*, Congress may *expressly* preempt state law by explicitly stating its intent to preempt in the text of the statute.[37]**

> ***Second*, Congress can "occupy the field" and impliedly preempt state law by creating a scheme of federal regulation so pervasive "as to make reasonable the inference that Congress left no room for the States to supplement it."[38] Such preemption is known as "field preemption."**

> **And *third*, federal law may impliedly preempt state law if the two regimes actually conflict, either because it is impossible to comply with both state and federal law or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[39] This is known as "conflict preemption."**

Below we examine how the doctrines regarding express and both types of implied preemption interact with the four categories of state bills in turn.

A. STATE LAWS BANNING FOOD AND COLOR ADDITIVES IN THE STATE FOOD SUPPLY ARE NEITHER EXPRESSLY NOR IMPLIEDLY PREEMPTED.

The FDCA does not expressly preempt state law provisions prohibiting select additives.

Express preemption occurs where Congress communicates through explicit statutory language that a state action is preempted by a federally regulated area. A federal agency can also preempt

state law through regulation, as long as it is acting within the scope of its congressionally delegated authority.[40] In the FDCA provisions regulating food and color additives, there is no language suggesting that Congress intended to preempt all state action on food and color additives, much less delegate authority to the FDA to do so.[41] In fact, the FDCA "contains few express preemption provisions related to food products, with the major exception being nutrition labeling information."[42]

Congress includes limited express preemption provisions in the FDCA, which preempt state laws and regulations that are "not identical to" federal requirements governing medical devices, drugs, and cosmetics, but has never added similar provisions related to food additives or GRAS.[43] When Congress expressly preempts states in the area of food law, it has been highly specific in creating narrow regulatory schemes for specific foods. This is only the case for colored oleomargarine, which has a unique statute with precise mandates for its production, labeling, and sale, and the statute specifically preempts state laws by requiring products produced and sold within the state to be "subject in the same manner and to the same extent to the provisions of [the chapter] as if it had been introduced in interstate commerce."[44] The inclusion of express preemption for colored oleomargarine impliedly indicates that other foods are not expressly preempted.

Further, Congress has rejected other such express preemption statutes that would have limited the states' abilities to pass more protective laws on adulterated food, unsafe colors, and food additives.[45] Specific ingredients not enumerated as explicitly preempted are impliedly permitted to be regulated by the states, so long as there is no implied preemption (discussed below).[46]

Field preemption does not apply to state law bans of specific chemical additives.

The doctrine of implied field preemption bars state action where the federal government develops "a scheme of federal regulation that is 'so pervasive as to make reasonable the inference that Congress left no room for States to supplement it.'"[47] Field preemption has generally been limited to areas characterized by a uniquely federal interest, such as in the registration of undocumented immigrants and the wholesale of natural gas in interstate commerce.[48] A finding of field preemption has historically been difficult to meet. Even where Congress has given FDA significant regulatory breadth under the FDCA, such as in drug regulation, the Supreme Court has held that claims based in state law were not preempted by a federal scheme if the state requirement was more stringent.[49] In that case, the court held that a state's more stringent requirements for drug labelling were not preempted by the FDA's scheme because it was not necessary to receive FDA approval to create a more protective label.[50]

Within field preemption, courts will often look to the intent of Congress for insight, and it has been repeatedly affirmed in the courts that Congress did not intend for the FDCA to preempt the field for food regulation.[51] If anything, federal law explicitly stresses the importance of strong state food safety programs. The Food Safety Chapter of the U.S. Code expressly encourages states to "establish, continue, or strengthen State food safety programs, especially with respect to the regulation of retail commercial food establishments."[52] Preserving food safety authority to states aligns with the large role states already play in regulating food safety, as states are responsible for food safety regulations and inspections for retail stores and food service establishments, such as restaurants.[53]

This dual jurisdiction over food safety has been supported by the courts. A New York federal district court addressing an adjacent question regarding a state liability claim for aspartame, an FDA-approved ingredient, found that the state law claim was not preempted by federal approval of the additive.[54] Dicta in the case suggests that the court viewed the preemption question broadly, and would likely similarly find that restrictions on additives in state bills would not be preempted because, according to the court, "[a]lthough [the defendant] argue[d] that the FDA's regulation of food additives is 'so extensive as to thoroughly occupy the field,' . . . they do not cite to any cases supporting that proposition, likely because it is incorrect."[55] The Supreme Court has echoed this understanding of the FDCA, and even in finding that there is no private right of action under the FDCA, left open the possibility that consumers can bring state law causes of action that run parallel to the FDCA, a theory that has been supported by the Ninth Circuit.[56] The FDCA seems to recognize and function through a state and federal partnership of regulation and enforcement in the area of food safety.

This informal state partnership for post market enforcement is beneficial, due to FDA's limited capacity. Under the current GRAS regime, almost 99 percent of new food additives introduced into commerce since 2000 have been designated safe by the food industry, not by FDA, as explained above.[57] Under this process, food manufacturers are not even required to notify FDA of new GRAS-assessed food additives, let alone get federal pre-market approval.[58] This suggests that federal regulation of food additives is not so pervasive that it implicitly precludes supplemental state regulation of food additives and GRAS substances.

Moreover, HHS has explicitly supported state action addressing food and health. In April 2025, Secretary Kennedy embarked on a "Make America Healthy Again" tour in the Southwest U.S. in part to "celebrate new state laws that ban ultra-processed foods and dyes in public schools, restrict SNAP purchases of candy and soda, and ban the addition of fluoride to public drinking water."[59] HHS and FDA recognize that state actions further their mission and invite this collaboration.

The lack of a functional approval system for many substances, described above, coupled with extremely limited post-market enforcement of additives and GRAS substances, are evidence that there is no implied field preemption of a state's authority to reassess and ban chemicals in foods.

The history of trans fat regulation in the U.S. helps prove that states are not preempted from additive bans, since states were able to create their own enhanced food safety standards through implementing restrictions on trans fat before it was federally banned. Trans fats were used in foods based on industry's determination of their safety; since they were used prior to 1958 they continued to be allowed in food as GRAS.[60] FDA received citizen petitions to ban the use of trans fat in 2004 and 2009, and in 2015 the agency finally declared that artificial trans fats were unsafe and published a rule banning them in food.[61] Prior to the FDA taking action, many states and localities implemented their own bans on trans fats.[62] These bans were not litigated, and scholars noted that preemption would not pose an issue because the FDA's authority was only in determining trans fat's GRAS status and labeling requirements, and a specific ban did not interfere with either of these duties.[63] State and local laws banning trans fats were not challenged on preemption grounds, so these theories were not tested in the court, but it seems likely that the lack of legal challenge was because there was not a cognizable preemption argument.

Conflict preemption does not prevent the banning of specific chemical additives.

Implied conflict preemption occurs when it is physically impossible to comply with both state and federal laws[64] or where state laws "pose an obstacle to the 'full purposes and objectives' of Congress."[65] There is no implied conflict preemption in any of these state bill provisions because it would not be impossible for food manufacturers to comply with both state and federal regulations, nor would such bills pose an obstacle to the accomplishment of Congress's purposes for the federal law.

There is strong precedent against finding a conflict preemption for state bans on specific additives. Courts have found against conflict preemption in other related cases where the central conflict was whether the state could restrict the use of certain ingredients approved by the FDA. In October 2023, the Eleventh Circuit Court ruled that a Florida state law prohibiting use of the ingredient "grains of paradise" in alcohol was not preempted despite FDA recognizing that ingredient as GRAS.[66] The Court noted that compliance with the state prohibition and the federal Food Additives Amendment was not physically impossible, because the company could still sell its alcohol in Florida without that ingredient while selling it out of state with the grains of paradise.[67] Additionally, the California Food Safety Act, enacted in 2023,[68] has not faced any litigation on preemption or other matters. This Act banned brominated vegetable oil, potassium bromate, propylparaben, and Red Dye No. 3.[69] This is a good indicator of general agreement that state laws such as this are not preempted by federal law, and there would be no conflict in complying with FDA regulations at the same time as the California Food Safety Act, since all the California Act requires is for producers to *not* use an ingredient.

There is no part of federal law that requires food manufacturers to include these additives or GRAS substances that are banned by state bills in their products,[70] thus there would be no conflict faced by companies attempting to comply with both federal and state law at once.

B. STATE LAWS PROHIBITING SYNTHETIC DYES, ADDITIVES, AND ULTRA-PROCESSED FOODS (UPFS) IN SCHOOL MEALS ARE NOT EXPRESSLY OR IMPLIEDLY PREEMPTED.

The FDCA does not expressly preempt state law provisions restricting the use of synthetic colors, other additives, or UPFs in school meals.

As discussed above,[71] there is no language within the FDCA explicitly preempting a state's ability to restrict specific additives, and Congress directly rejected a bill that would have imposed explicit preemption of additives.[72]

In the context of schools, risk of express preemption is even more limited. The only text in the FDCA addressing food in schools is specific to allergy and anaphylaxis risk.[73]

School food is also regulated by USDA, as that is the agency that funds school meal programs and sets the general nutritional guidelines for foods that can be served in schools that operate the National School Lunch Program and School Breakfast Program.[74] USDA similarly does not expressly preempt states from creating their own restrictions on additives in school. There is no language to suggest that the school meal provisions proposed in state laws could be expressly

preempted.[75] In addition, various USDA guidance or other materials clearly note that state and local policies can improve upon federal school meal guidelines.[76] As discussed below, USDA also is extraordinarily deferential to states.

Field preemption likely does not bar state restrictions of synthetic dyes, other additives, or UPFs in school meals.

Field preemption is even more unlikely to be found in the case of state school food regulations than it is in the case of additive bans in the general food supply. Education is a field traditionally belonging to the states.[77] States have broad authority to regulate schools, and even where the government provides regulation for school programs, its function is to provide a minimum standard upon which states may build unless expressly preempted.

States and localities have also historically set higher nutrition standards within their schools than required by the federal government.[78] States and localities have broad authority over schools and the foods served there, meaning there is no field preemption against the specific ban of synthetic colors, other additives, or UPFs in schools.[79]

Evidence of this can be seen from local school food restrictions that are already in effect. New York City currently bans from school foods artificial colors, artificial flavors, certain emulsifiers, non-nutritive sweeteners, flavor enhancers, and several other groups of ingredients.[80] Boston uses similar lunch guidelines that include a list of ingredients that are prohibited from entering new foods and must be phased out of existing products, including several artificial colors, artificial and unspecified natural flavors, artificial preservatives, artificial sweeteners, emulsifiers, and more.[81]

In addition, the federal government has implicitly endorsed state regulation of additives in school meals through specific bans. On March 24, 2025, Governor Morrisey of West Virginia signed into a law a bill banning seven synthetic dyes in school meals.[82] The signing was attended and lauded by Secretary Kennedy,[83] indicating that the U.S. Department of Health and Human Services does not believe there is a conflict between the state actions and its own authority.

Conflict preemption does not prevent state laws restricting the use of synthetic dyes, other additives, and UPFs in school meals.

State laws restricting the sale of foods of synthetic colors, other additives and UPFs in schools

also face virtually no risk of conflict preemption. While the federal government provides guidance on the composition and nutritional content of school meals, as described above, states are free to further regulate the nutritional content of meals, as well as what chemicals and additives should be barred from school meals for children, and many do.[84] There is no inherent conflict between the federal floor provided by NSLP school nutrition guidelines that must be followed for foods sold in schools, and further state restriction on additives or UPFs—schools can comply with both simultaneously.

C. GRAS REPORTING REQUIREMENTS ARE NOT LIKELY TO BE EXPRESSLY OR IMPLIEDLY PREEMPTED.

The FDCA does not expressly preempt a state requirement to report on the use of GRAS substances in foods.

New York, New Jersey, and Pennsylvania have pending bills that would require companies to report to the state any food substances they have deemed GRAS without notifying FDA.[85] These substances would then be available in a publicly available database as GRAS listings.[86]

There is no language in the FDCA preempting a state's ability to request information regarding the use of certain ingredients or the safety of such ingredients from manufacturers. When Congress has created broader information-oriented statutory schemes intended to preempt a specific area of food safety, it has been explicit.[87] Moreover, when Congress amended the FDCA to add express preemption provisions governing nutrition labeling under the 1990 Nutrition Labeling and Education Act (NLEA),[88] In the words of one court, Congress clearly stated that it designed the statute to "not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C § 343-1(a)] of the [FDCA]."[89] Areas explicitly preempted by NLEA under 21 U.S.C.§343-1(a) are highly specific,[90] and otherwise the statute does not explicitly restrict states' ability to regulate or request information in the pursuit of food safety.

Field preemption does not interfere with the creation of reporting requirements of GRAS substances used in foods within the state and a public database.

Field preemption is not a concern for state GRAS disclosure requirements. While the FDA maintains a database of GRAS notices, this database does not capture substances that are used in food according to a "self-GRAS" determination, and there is no federal law that conflicts with the requirements set forth by GRAS listing provisions in state bills. Prior to 1980, the FDA maintained a database titled "Select Committee on GRAS Substances," ("SCOGS") which made public 115 reports on GRAS substances published between 1972 and 1980.[91] The FDA later established a new database of GRAS notices that covers 1998 to the present.[92] However, the databases do not contain a complete record of GRAS substances because they fail to capture self-GRAS substances, and both databases lack GRAS reporting between 1980 and 1998.

The information required by the GRAS reporting provisions in proposed state bills include the essential contact information for the reporting organization, and the basic statutory basis and data necessary to make a GRAS determination for a product.[93] While these bills generally would require the state agency to maintain a public database with these reports of GRAS substances

used in the state,[94] this would be a state actor fulfilling state law. When it comes to sharing GRAS determinations, the FDA has left open a major gap in the field by not maintaining a complete database, nor requiring any mandatory GRAS notifications at all, indicating that states have the right to create their own laws and regulations in this space. Even where a substance is reported to and posted in the FDA GRAS database, there is no inherent field preemption, as it is very common for the federal government and states to each set their own simultaneous requirements for reporting.[95]

Conflict preemption does not interfere with state law creation of reporting requirements for GRAS substances used in foods within the state via a public database.

Finally, a state law provision creating a GRAS substance disclosure requirement would not be barred by conflict preemption, as it is aligned with federal law, thus compliance with this disclosure requirement poses no obstacle to compliance with federal law. Under federal law, a food manufacturer may take advantage of the GRAS process and not undergo the more thorough but lengthy FDA additive approval process.[96] Companies are required by law to determine that a substance is GRAS *before* it can be used in any US jurisdiction, and these bills merely require companies to report on their compliance. For example, the proposed New York bill would require the following: if a product is sold in the state and the product contains a GRAS substance that was not submitted via notification to FDA, a supplier must submit a report to the commissioner with certain information, such as the contact information for the reporting organization, the names of any GRAS substances used, intended conditions of use for the GRAS substance, the statutory basis for the determination of the GRAS status, an affirmation that there is data to support the GRAS determination, and a similar affirmation that such data will be made available to the commissioner upon request.[97] The commissioner would be required to maintain a public database with these reports.[98] Other than reporting the use of GRAS substances in foods offered for sale in the state, reporting bills like New York's do not add any substantive premarket review requirements. Listing requirements would only be triggered after GRAS status is attained and would have no effect on FDA's GRAS policies, guidance, or regulations.

Cities have been successful in implementing similar reporting programs for food manufacturers. For example, in 2017 the City of San Francisco passed an ordinance that requires certain grocery stores to report the antibiotic practices and policies of any poultry and meat producer from which they source to the City's Department of the Environment.[99] For the past 8 years, San Francisco has been able to maintain records of what antibiotics are being used in poultry and meat products sold in its jurisdiction. This ordinance has not been challenged for conflicting with the FDA's jurisdiction over animal antibiotic regulation, likely because there has been no conflict in complying with both laws.

D. STATE WARNING LABELS FOR CHEMICAL ADDITIVES LIKELY ARE NOT EXPRESSLY PREEMPTED BUT MAY FACE A CHALLENGE FOR CERTAIN FOOD PRODUCTS UNDER IMPLIED CONFLICT PREEMPTION.

Express preemption is likely not an issue under FDCA but might pose a challenge under other federal laws for labeling of meat and poultry products.

Most food and beverage products are subject to the authority of the FDA, except for meat,

poultry, and some egg products, which are instead under the authority of the U.S. Department of Agriculture.[100] The FDCA and accompanying FDA regulations contain various labeling requirements for products covered by the FDA's authority.[101] If a product does not comport with the labeling requirements under 21 U.S.C. § 343, such food will be considered misbranded.[102] These requirements mainly concern the proper identification and description of the product and the disclosure of certain nutritional information. Manufacturers are also required to disclose any major food allergens and those nonmajor food allergens determined by the Secretary contained in the product on its label.[103] Regulations promulgated by the FDA under the authority granted by the FDCA further detail the specific requirements for displays on food packaging, identification of products, disclosure of ingredients, nutrition labeling, nutrient-based and health claims.[104] The FDCA does not contain any language to expressly preempt state warning labels.

The NLEA, which amended 21 U.S.C. § 343, states that "no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce" any requirements that are not identical to certain provisions contained in 21 U.S.C. § 343-1.[105] None of the provisions in § 343 or § 343-1 address warning labels on foods[106], except perhaps the requirements to disclose major and non-major allergens. Those provisions are unlikely to preempt state bills, however, as they only require the disclosure of all major allergens and any non-major allergens identified by the Secretary on product labels.[107] The use of artificial flavoring, artificial coloring, or chemical preservatives must also be displayed on product labels under § 343(k).[108] This provision is not construed as a warning label requirement and only requires that a product "bears labeling stating th[e] fact" that it contains any artificial flavor(s), color(s), or preservative(s).[109] As such, this provision is unlikely to preempt any state warning label requirements.

The rest of the NLEA provisions only apply to nutrition labeling. The notes to the NLEA even state that it "shall not be construed to apply to any requirement respecting a statement in the labeling of the food that provides for a warning concerning the safety of the food or component of the food."[110]

Further, the regulations promulgated by the FDA only require a few highly specific warning labels for the following: food packaged in self-pressurized containers; foods containing or manufactured with chlorofluorocarbon or other ozone-depleting substances; foods containing psyllium husk or shell eggs; foods that are marketed as weight reducing agents and derive more than 50 percent of their caloric value from protein; dietary supplements contain iron or iron salt; and juices that have not been properly processed to address the presence of pathogens.[111] This regulation does not expressly bar states from imposing additional warning label or safe handling requirements and only preempts state and local governments from establishing or continuing in effect any "requirement requiring safe handling instructions on unpasteurized shell eggs that are less stringent than those required [under the regulation]."[112] This language suggests that the FDA envisioned the ability of states to effectuate additional or more stringent warning label requirements than those set out in federal regulations. Furthermore, as noted earlier, 21 U.S.C. § 2104 holds that the "Secretary shall encourage States to – establish, continue, or strengthen food safety programs," suggesting that states have the ability to impose their own, stronger food safety requirements.[113]

By contrast, warning labels may face preemption if they are applied to meat or poultry, as the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) both contain express preemption provisions regarding their labeling requirements. If a meat or poultry product

contains a substance which invokes a warning label under a state statute, the statute would likely be federally preempted. Under the FMIA "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State...with respect to articles prepared at any establishment under inspection in accordance with the requirements."[114] Labels controlled under this act include "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." In *Thornton v. Tyson Foods,* the Tenth Circuit held that claims seeking to impose additional labeling requirements under state law on USDA regulated food could not be heard because they were preempted by the FMIA.[115] In *Thornton,* the plaintiffs claimed that labels on defendant's beef products, despite being approved by the USDA, were deceptive because they included a "Product of the U.S.A." statement, even though the products did not come from cattle born or raised in the United States.[116] The court held that any resolution of the plaintiff's claims would require producers to use labels other than the ones approved by the USDA, and thus were preempted by express preemption clause of the FMIA.[117]

Under the PPIA, state warning labels or other labeling requirements also likely would be preempted. The PPIA states that "[m]arketing, labeling, packaging or ingredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any official establishment in accordance with the requirements under this chapter."[118] States may, however, "exercise concurrent jurisdiction...over articles required to be inspected under this chapter for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded."[119] In *Cohen v. ConAgra Brands, Inc.*, the Fifth Circuit dismissed a lawsuit brought against the manufacturer for false advertising because the claim was preempted by the PPIA.[120] In *Cohen,* the plaintiff claimed that the defendant falsely advertised its

frozen poultry products by stating they are "natural and preservative-free" on their labels, when the products contained synthetic ingredients.[121] The court held that consumers could not challenge a manufacturer use of USDA-approved labels and that claims regarding such labels are preempted by the PPIA.[122] The plaintiff also challenged whether the labels were in fact approved by the USDA, to which the court responded by directing the district court to determine whether the labels had been approved on remand and stating that "if ConAgra's labels were reviewed and approved by FSIS, then Cohen's claims challenging those claims would be preempted."[123]

Under both statutes, state laws imposing warning labels would be vulnerable to federal preemption challenges regarding labeling of meat and poultry products. Any additional or stronger label requirements by states would certainly be preempted as both the FMIA and PPIA expressly prohibit any labeling requirements "in addition to" those imposed by the USDA. Due to this, state bills establishing warning label requirements should provide exemptions to products subject to the authority of the USDA. For example, on June 22, 2025, Texas passed a bill requiring warning labels on products containing certain substances.[124] The warning label requirement does not apply to "a product regulated by the United States Department of Agriculture's Food Safety and Inspection Service."[125] Louisiana also passed a law in 2025 requiring warning labels of products containing specific additives but did not explicitly exempt products under the authority of the USDA.[126]

Moving forward, states may want to explicitly exclude products regulated by USDA from their warning labels. They may also want to include a severability clause in their bills, noting that if any portion of the law is struck down, the rest of it is intended to survive.

Warning label requirements are not restricted by field preemption.

State warning label bills should generally not be impliedly field preempted by the FDCA or NLEA either. The Second Circuit has found that "[i]t is well settled that in the view of the primacy of state regulations of matters of health and safety, state and local regulations related to [those] matters… can normally coexist with federal regulations" and "if there is any ambiguity in the NLEA and FDA regulations, we are bound to accept the reading that disfavors pre-emption."[127] In light of this view, labeling regulations such as those developed by the FDA to implement the FDCA or NLEA should not be interpreted to preempt state law so long as the two schemes are able to coexist.

First, with respect to the FDCA, the Ninth Circuit has held that traditional state powers, like protecting public health and safety, cannot be impliedly preempted.[128] In *Davidson v. Sprout Foods, Inc.,* the Ninth Circuit addressed the question of whether implied preemption under the FDCA prevented California's Sherman Act[129] from being applied to food labels.[130] The court held that the FDCA does not preempt claims made under the state's Sherman Act and noted the accepted presumption that "historic police powers of the State are not preempted unless that was the clear and manifest purpose of Congress."[131] Given this strong presumption, implied field preemption will likely not create a barrier to specific chemical warning labels, even where the FDCA speaks directly to warning labels.

The only FDA regulation that addresses warning labels specifically is 21 C.F.R. § 101.17, which, for example, requires warning labels for the safe handling of shell eggs and on products that contain certain ingredients or are packaged with certain materials.[132] This regulation does not contain any provision preventing states from imposing any additional warning labels or safe handling information, and only preempts the establishment of requirements for the safe handling of shell

eggs that are less stringent than those required by the regulation.[133] Thus, even if state warning labels cover the same food items identified in this regulation, both schemes should be able to coexist so long as the state's requirements are more stringent. Further, the listing of specific warning label requirements in this regulation without a clear preemption provision implies that the FDA did not intend to occupy the field with these labels.

Second, with respect to the NLEA, courts have held that the presence of express preemption provisions within the statute precludes any claims of implied preemption. In *Holk v. Snapple Beverage Corporation,* the Third Circuit stated that:

> NLEA declares that courts may not find implied preemption based on any provision of NLEA. It states that the Act "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under the Federal Food, Drug, and Cosmetic Act." Accordingly, if we are to find that Holk's claims are impliedly preempted, we must do so based on provisions of federal law other than the NLEA.[134]

In *Grocery Manufacturers Association v. Sorrell,* a Vermont District Court also noted that "[t]he NLEA's express preemption clauses foreclose any claim of implied preemption."[135] As stated previously, there is nothing in the FDCA that expressly preempts state warning labels and therefore the NLEA cannot impliedly preempt any state warning label requirements.

Warning label requirements may face some specific conflict preemption challenges for frustration of federal objectives, but likely largely do not implicate conflict preemption.

Warning label statutes may face narrow conflict preemption challenges on certain substances due to the potential for these labels to frustrate federal objectives, but there are several strong reasons why overall, these statutes should not implicate conflict preemption. This is because there is a strong textual argument that the lack of express preemption indicates there is no conflict preemption. Also, there is likely no physical impossibility to complying with both the state and federal laws.

Conflict preemption might arise through the issue of "frustrat[ing] federal purposes."[136] For example, a Court of Appeals in California found that the requirement for the use of a warning label on a product that is generally promoted by FDA for its nutritive value may stand as an "obstacle to the accomplishment and execution of the full purposes and objectives" of the Federal government.[137] California's Proposition 65, requiring labels warning Californians about potential chemical exposures in products that are linked to cancer, birth defects or other reproductive harm, was found to be preempted by FDA guidance to encourage the consumption of whole grains.[138] Here, the state appellate court held that Proposition 65 warning labels could not be applied to breakfast cereals containing acrylamide because its high correlation of concentration in whole grain products means that the warning label would dissuade consumers from selecting whole grain products, posing an obstacle to a federal objective.[139] Proposition 65 still applies, however, to other products in which no specific conflict was found.[140] The specific chemicals that require labels may be challenged in similar suits if they are commonly used in foods with certain health benefits promoted by FDA. For this reason, it will be helpful in drafting these laws to have a clear sense of what food products contain these substances to gauge the likelihood of success.

Outside of these narrow potential areas for conflict, it is unlikely for these to generally face conflict preemption. The FDCA does not specifically address warning labels. As stated previously, the only FDA regulation that touches on warning labels, 21 C.F.R. §101.17, does not contain any provision preempting states from: (i) requiring warning labels for substances not identified in the regulation; (ii) requiring additional warning labels for substances identified in the regulation; or (iii) imposing more stringent requirements for warning labels on shell eggs (which have a very detailed labeling requirements in the regulations but also explicitly allow states to impose more stringent requirements).[141] Even if state laws require additional warning labels for the substances regulated under 21 C.F.R. §101.17, it is still feasible for manufacturers to comply with both the state law and federal law. For example, one of the warning labels required under 21 C.F.R. §101.17 requires warning labels for products that are advertised as weight-reducing agents and derive more than 50 percent of their caloric value from protein.[142] The label of such products is required to state:

> **"WARNING: Very low calorie protein diets (below 400 Calories per day) may cause serious illness or death. Do Not Use for Weight Reduction in Such Diets Without Medical Supervision. Not for use by infants, children, or pregnant or nursing women."[143]**

A state law requiring an additional warning about the safety of an additive contained in such a protein product does not prevent manufacturers from being able to simultaneously include the FDA–required warning. Further, it seems unlikely that any additional state-required labels would frustrate the federal objective of the FDA-required labels under 21 C.F.R. § 101.17. The warning labels required by state laws would provide consumers with more information, strengthening the FDA's ability to maintain the health and safety of the nation's food supply.

Additionally, it is unlikely that there would be a conflict between additive warning labels and any affirmative health claims a manufacturer wishes to make. Under 21 C.F.R. § 101.14, the FDA does not require any affirmative health claims on packaged foods.[144] If a manufacturer wanted to claim a health benefit for a particular additive that also triggered a state-required warning label, a conflict could potentially arise. Given that there is no right or requirement under federal law to include health claims, however, courts should not find that the state warning label conflicts with any FDA objective or prevents manufacturers from complying with both state and federal law.[145]

In the context of a state law requiring warning labels on food containing genetically-modified (GMO) ingredients, a Vermont district court, in *Grocery Manufacturers Association v. Sorrell,* found that it was not physically impossible to comply with both federal and state laws, noting that the FDA already allows for voluntary GMO disclosures.[146] The court also noted that the state-required warning labels did not create an obstacle to federal objectives under the FDCA either.[147] The court found the plaintiffs' strongest argument to be based on conflict preemption by the NLEA, since its intent was to "promote national uniformity in certain aspects of food labeling, so that the food industry can market its products efficiently in all 50 states in a cost-effective manner."[148] The court, however, ultimately found this argument unpersuasive[149] and found that the state law requiring GMO disclosures "can coexist with federal regulations."[150] Additionally, the Third Circuit has held that the express preemption clause in the NLEA indicates that a court may not find implied conflict preemption under that statute, unless the state law provision "is expressly preempted under the [FDCA]."[151] There is nothing in the FDCA or any other FDA regulations that expressly preempts states from establishing additional warning label requirements and therefore the NLEA cannot form the basis of conflict preemption challenges to state warning label laws.

IV. "DORMANT" COMMERCE CLAUSE ANALYSIS OF THE RELEVANT STATE BILLS

The categories of state bills analyzed in this report likely would not violate the Commerce Clause via the dormant Commerce Clause doctrine. Traditionally, a state law or regulation violated the dormant Commerce Clause only if it (1) clearly discriminated against interstate commerce in favor of intrastate commerce, (2) imposed a burden on interstate commerce incommensurate with the local benefits secured, or (3) had the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.[152]

The Supreme Court recently clarified the scope of the dormant Commerce Clause in *National Pork Producers Council v. Ross*.[153] In *National Pork Producers*, the Supreme Court upheld California's Proposition 12, which forbids the sale in California of whole pork meat that comes from breeding pigs (or their immediate offspring) that are confined in a cruel manner. The challenge alleged the Proposition's animal welfare requirements would have the practical effect of controlling commerce outside of California and that the burdens on interstate commerce clearly outweighed local benefits.[154] The Supreme Court stated that there is no *per se* rule in which the practical effect of controlling commerce outside the state automatically creates a violation of the dormant Commerce Clause.[155] The *National Pork Producers* Court held that the antidiscrimination principle lies at the "very core" of dormant Commerce Clause jurisprudence, emphasizing that the dormant Commerce Clause has almost exclusively been applied to strike down state laws when the laws were designed to benefit in-state economic interests over out-of-state competitors.[156] Following this decision, none of the categories of laws described above will likely face a meaningful challenge under the dormant Commerce Clause.

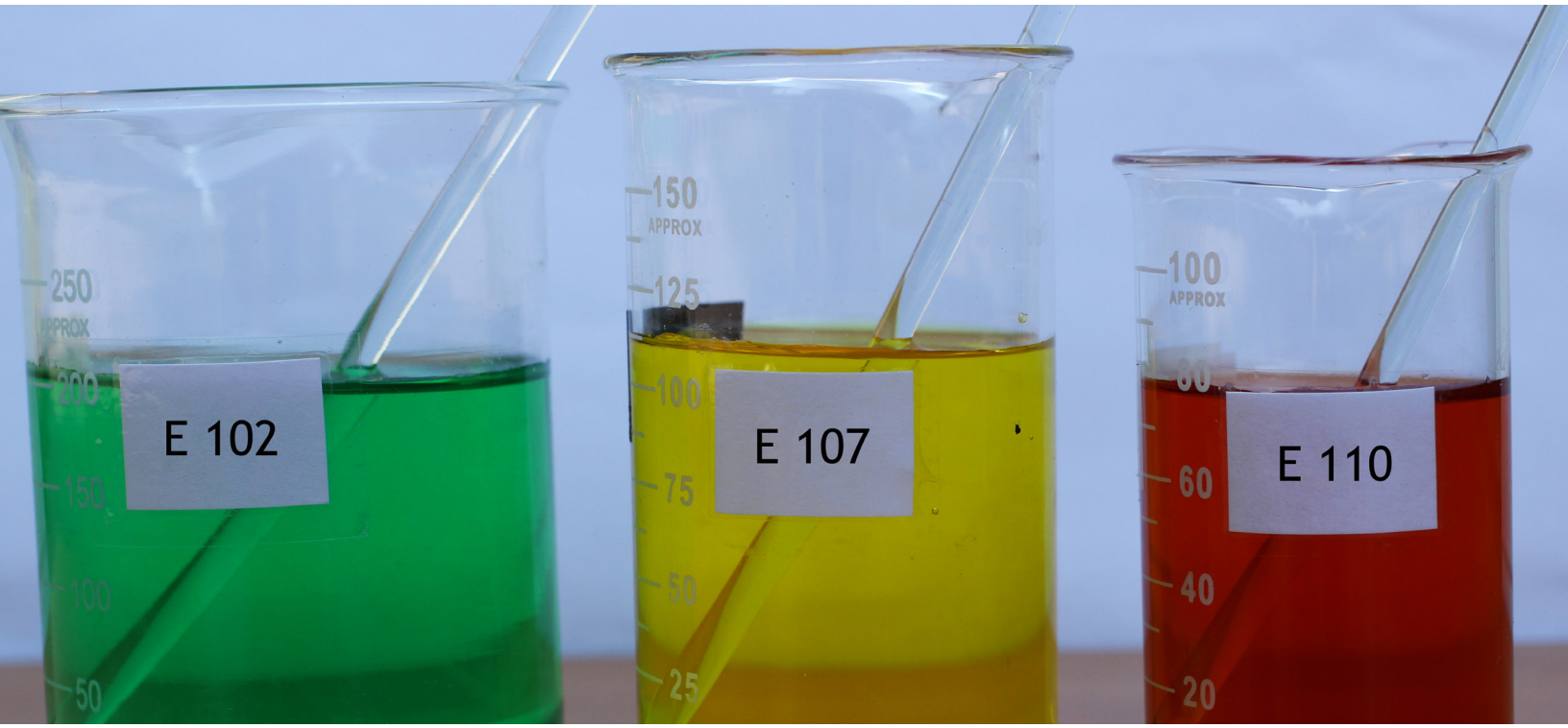
Like Proposition 12, there is no possible contention that any of these four categories of bills discriminate against out-of-state interests, as the laws apply equally to in-state and out-of-state manufacturers that wish to avail themselves of the regulating states' markets. Under the requirements of these bills, producers from any state would be required to undergo the same process to remove the specific additives from their foods or add a warning label to sell them in the regulating state or remove the additives and synthetic colors if they wish to be eligible for sale in schools within the regulating state. All producers would also face identical requirements for producing documentation to the commissioner on the GRAS status of their ingredients. The Court in *National Pork Producers* noted that in the modern marketplace, "many (maybe most) state laws have the 'practical effect of controlling extraterritorial behavior.'"[157] Therefore, any challenge on the basis of a mere impact on out-of-state manufacturers will likely be insufficient to satisfy this test.

A dormant Commerce Clause challenge to these provisions would represent a far weaker case than even that presented in *National Pork Producers,* because the balance between the burdens on interstate commerce and the local benefits tips strongly in favor of these types of state laws. Additionally, although some lower courts are still using the traditional three-part dormant Commerce Clause standard[158]—despite the ruling in *National Pork Producers* focusing on the discrimination against out-of-state interests—the four types of state laws discussed in this memo would also be unlikely to pose any violations under these standards, as the laws: (1) apply equally

to both in and out-of-state companies selling foods and food chemicals in the regulating state, (2) do not benefit local businesses over out-of-state businesses that sell to foods and food chemicals in the regulating state, and (3) do not affect any companies that sell their products entirely outside the boundaries of the regulating state.

First, as noted above, none of these provisions discriminate against interstate commerce in favor of intrastate commerce. Second, the burden imposed by these provisions is strongly outweighed by the local benefits secured (known as the *Pike* test).[159] All four of these categories of bills protect legitimate local health and safety interests. There are numerous peer-reviewed studies of the health risks posed by these specific food additives and synthetic dyes set to be prohibited in food or restricted in schools in these state bills.[160] Various articles also discuss the issues with the GRAS loophole allowing chemicals into the food supply with little to no oversight, meaning state regulation to address this issue is warranted.[161] State governments are interested in protecting their constituents, and also in reducing the cost burden they face due to high and growing rates of diet-related disease.[162]

The burdens posed are minor, in comparison. As bans on additives or ingredients, as described above, there has been a long tradition of state level bans of certain ingredients or substances in food, and food manufacturers have always been able to adjust to the state patchwork. State bans allow manufacturers to take early steps to test out new product lines that are free from the banned ingredients. State bans can also spur future federal action, as was the case with California's bans of BVO and FD&C Red No. 3, which contributed to spurring a FDA ban of these two substances.[163] Further, compliance may not be so complicated, as many of the state bills target the same substances or additives for removal from the food supply.[164] The same is true for proposed bans of substances in school foods – many proposals include the same substances, such as certain synthetic color additives and other additives like potassium bromate, propylparaben, and titanium dioxide. This is particularly true of synthetic color additives, which were included in a law enacted by California in September 2024,[165] followed by Arizona, Delaware, Louisiana, Tennessee, Texas,



Utah, Virginia, and West Virginia, which all enacted bills in 2025 prohibiting certain color additives in school foods.[166]

With regard to proposed GRAS listing requirements, these provisions ask companies to share information that should already be known about a substance for the GRAS determination made by the manufacturer. While initial compliance poses a burden, this is a one-time burden to the company. Further, the manufacturer should already have the requested GRAS information if they developed the substance themselves, or if they acquired the substance from a supplier, they have the most direct contact with that supplier to obtain such information. Moreover, a supplier can avoid this burden by notifying FDA of the GRAS substance and exempting themselves from the reporting requirement.[167] This burden is relatively minimal, especially when compared to the burden that the public shoulders in the current regime where there is no notification for many GRAS substances and thus extremely limited oversight of such substances. The responsibility for understanding what additives are used in foods is disproportionally carried by consumer groups, advocates, and consumers themselves, who face severe illness and death as a result of this pervasive GRAS loophole.[168] Rather than generating a new burden, this law would shift that burden back to the party in the best position to carry it.

In the case of proposed warning label provisions in states such as Texas (enacted), Louisiana (enacted), Pennsylvania, and Wisconsin, there is specific relevant precedent.[169] When applying test of interstate burdens versus benefits[170] in the context of Vermont's GMO labeling law, the *Grocery Manufacturers Association v. Sorrell* court found there was no Commerce Clause violation. Vermont's law did not "'require manufacturers to label all [products] wherever distributed,'... because '[t]he Vermont statute, by its terms, is indifferent to whether [products] sold anywhere else in the United States are labeled or not'... [and] '[t]o the extent the statute may be said to "require" labels on [products] sold outside Vermont, then, it is only because the manufacturers are unwilling to modify their production and distribution systems to differentiate between Vermont-bound and non-Vermont-bound [products].'"[171] Applied in another context, California's Proposition 65 label has been a requirement for manufactures in the market since 1986,[172] and manufacturers have successfully navigated a single state labeling requirement through either labelling all products, or differentiating their California products in their supply chains.[173] This suggests that single state labeling requirements are manageable and can be implemented without impairing businesses.

Lastly, none of these four state provisions exercise extraterritorial control of commerce occurring entirely outside the boundaries of the state in question. All four of the provisions specifically regulate the content or information regarding use of chemicals or substances in food offered for sale in the relevant states. Based on the relevant precedent under *National Pork Producers* and even under the earlier three-part test, it would be very unlikely for a court to find that any of these state bills presents a dormant Commerce Clause violation.

V. CONCLUSION

As discussed in the background, state action to address additives and GRAS substances is not only beneficial to protect their residents given the limited oversight FDA has shown in this area, but also builds on a long tradition of state power in the areas of public health, safety, and welfare.

State statutes banning specific additives statewide, regulating additives in school meals, and creating GRAS reporting requirements likely are not preempted under express, implied field, or implied conflict preemption. Further, in the aftermath of *National Pork Producers*, these same bills are in very little danger of being struck down under the dormant Commerce Clause.

The bills most likely to face credible legal challenges if enacted are the warning labeling requirements, which may face challenges on express preemption related to meat and poultry, implied conflict preemption (and where it occurs, it would only be a concern on some specific products). However, as described throughout this report, there are strong counterarguments to the implied conflict preemption, and state legislation could be drafted in such a way to avoid the express preemption issue. Such warning label laws may also face first amendment challenges, an analysis of which is beyond the scope of this report.

ENDNOTES

[1] Bill search conducted by authors via BillTrack50 using the following search terms: "additive[s]" "ultraprocessed" "ultra-processed" "generally-recognized as safe" "GRAS" "dye[s]" "chemical abstracts service" "CAS number" "CAS no." The full list of bills is on file with the authors.

[2] California Food Safety Act, ch. 328, 2023 Cal. Stat. (codified at Cal. Health & Safety Code § 109025) (banning brominated vegetable oil, potassium bromate, propylparaben, red dye 3). CA AB2316, 2023-2024 Legis. Sess. (CA 2024) (banning schools from using FD&C Red Dye No. 40, FD&C Yellow Dye No. 5., FD&C Yellow Dye No. 6, FD&C Blue Dye No. 1, FD&C Blue Dye No. 2. FD&C Green Dye No. 3).

[3] States also have broad discretion over education and requiring nutrition education as part of the curriculum is historically in control of the state, however, recent federal criticism and spending threats against school systems for DEI policies indicates this power balance should be closely watched. For now, this is not a widely used state strategy in the food chemical space, and it is unlikely to be challenged under preemption doctrine.

[4] FDA maintains a database of GRAS substances for which it has received and reviewed a voluntary notification; however, this database does not contain substances that were self-determined GRAS by the manufacturer. In addition, there is a several year gap between this database and its predecessor, meaning any substances determined GRAS during that time period—even with FDA notification—are not captured. *See* U.S. Food and Drug Admin, GRAS Notices, https://www.hfpappexternal.fda.gov/scripts/fdcc/index.cfm?set=GRASNotices&sort=Date_of_closure&order=DESC&type=basic&search=, (last accessed Mar. 6, 2025).

[5] BillTrack50 bill sheet on file with authors.

[6] S.B. 9, 95th Gen. Assemb., Reg. Sess. (Ark. 2025); H.B. 2354, 87th Leg., Reg. Sess. (W. Va. 2025).

[7] *Food safety and chemical disclosure act,* S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025) (substituted for Assemb. B. 1556 on June 17, 2025); Cal. Health & Safety Code § 109025 (2023). States who have introduced these types of bills include Arkansas (enacted), Connecticut, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and West Virginia.

[8] States that introduced or enacted bills to ban certain additives and synthetic colors in schools include Arizona, Delaware, Florida, Georgia, Hawaii, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, West Virginia, and Wisconsin. BillTrack50 bill sheet on file with authors. *See also* Interactive Map Tracking State Food Chemical Regulation, Environmental Working Group (Oct. 2025), https://www.ewg.org/news-insights/news/2025/03/interactive-map-tracking-state-food-chemical-regulation-us.

[9] *See, e.g.,* H.B. 2164, 57th Leg., 1st Reg. Sess. (Ariz. 2025); H.B. 3292, 89th Leg., Reg. Sess. (Tex. 2025); S.B. 802, 2025 Leg., Reg. Sess. (Mo. 2025); Assemb. B. 1264, 2025-2026 Leg., Reg. Sess. (Cal. 2025); H.B. 4339, 126th Gen. Assemb., 126th Sess. (S.C. 2025).

[10] Some states, including New York, would ban the use of specific color additives in all school meals. *See* S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025). Other states, like Texas, would only ban the use of certain additives in school meals that are subsidized by the state. *See* S.B. 314, 89th Leg., Reg. Sess. (Tex. 2025).

[11] S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025); Assemb. B. 4640, 2024-2025 Leg., Reg. Sess. (N.J. 2025); H.B. 1130, 2025-2026 Gen. Assemb., Reg. Sess. (Pa. 2025).

[12] *See, e.g.* H.B. 0641, 2025 Leg., Reg. Sess. (Fla. 2025); S.B. 14, 2025 Leg., Reg. Sess. (La. 2025); H.B. 260, 2025 Leg., Reg. Sess. (Mo. 2025) (also targets heavy metals, which are regulated through a separate contamination framework and are outside the scope of this analysis); H.B. 1133, 2025-2026 Gen. Assemb., Reg. Sess. (Pa. 2025); S.B. 25, 89th Leg., Reg. Sess. (Tex. 2025); Assemb. B. 550, 2025-2026 Leg., Reg. Sess. (Wis. 2025).

[13] *See, e.g.,* H.B. 113, 194th Gen. Court (Mass. 2025); S.C. R61, Leg. Sess. (Ky. 2025).

[14] H.B. 113, 194th Gen. Court (Mass. 2025). States have broad authority to create commissions and only need to consider preemption as it pertains to actions taken on specific recommendations coming out of those commissions. States will need to be wary of state constitutional or legislative bans on special commissions. *See e.g.* S.D. Const. art. III §26 ("The *Legislature shall not delegate to any special commission*, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property, effects, whether held in trust or otherwise, or levy taxes, or to select a capital site, or to perform any municipal functions whatever." (emphasis added); UT Const. art. VI § 28 (containing the same provision). (This is a minority rule and does not prevent the commissions from existing in the first place, but the power of these commissions to implement tangible changes will be limited if they effect municipalities or implicate municipal powers).

[15] *See e.g.* Jennifer L. Pomeranz et. al., *Regulation of Added Substances in the Food Supply by the Food and Drug Administration Human Foods Program*, Am. J. Pub. Health, 1016 (2024); Maricel Maffini et. al., *We are what we eat: Regulatory gaps in the United States that put our health at risk*, PLOS Biology, (2017).

[16] USA Gov, Food and Drug Administration (FDA), https://www.usa.gov/agencies/food-and-drug-administration#:~:text=The%20

Food%20and%20Drug%20Administration,health%20information%20to%20the%20public.

[17] *See e.g.* Pomeranz, *supra* note 15.

[18] 21 U.S.C. § 348(b).

[19] Public Law 85-929, codified at 21 U.S.C. § 341 et seq.

[20] 21 U.S.C. § 321(s); 21 C.F.R § 170.30; Environmental Working Group, *What is GRAS?*, (Mar. 24, 2025), https://www.ewg.org/news-insights/news/2025/03/what-gras

[21] *See, e.g.,* S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025); Assemb. B. 4640, 2024-2025 Leg., Reg. Sess. (N.J. 2025); H.B. 1130, 2025-2026 Gen. Assemb., Reg. Sess. (Pa. 2025).

[22] S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025).

[23] 21 U.S.C. §§ 321, 343, 379e; 21 C.F.R. §§ 74, 80, 82.

[24] 21 U.S.C. § 379e(b); 21 C.F.R. § 74.

[25] 21 U.S.C. 379e(c); 21 C.F.R. § 80; Color Additives in Food, U.S. Food & Drug Admin. (Jul. 6 2023) https://www.fda.gov/food/color-additives-information-consumers/color-additives-foods.

[26] Color Certification FAQs, U.S. Food & Drug Admin. (Mar. 2 2022) https://www.fda.gov/industry/color-certification/color-certification-faqs#:~:text=as%20%E2%80%9Ccertifiable.%E2%80%9D-,How%20FDA%20Determines%20Whether%20a%20Color%20Additive%20Needs%20Batch%20Certification,raw%20materials%20obtained%20from%20petroleum.

[27] Color Certification FAQs, U.S. Food & Drug Admin. (Mar. 2 2022) https://www.fda.gov/industry/color-certification/color-certification-faqs#:~:text=as%20%E2%80%9Ccertifiable.%E2%80%9D-,How%20FDA%20Determines%20Whether%20a%20Color%20Additive%20Needs%20Batch%20Certification,raw%20materials%20obtained%20from%20petroleum.

[28] 21 CFR Part 73; Color Additives in Food, U.S. Food & Drug Admin. (Jul. 6, 2023) https://www.fda.gov/food/color-additives-information-consumers/color-additives-foods.

[29] *See* Termination of Provisional Listings of FD&C Red No.3 for Use in Cosmetics and Externally Applied Drugs and of Lakes FD&C Red No. 3 for All Uses, 55 Fed. Reg. 3516, 3517 (Feb. 1, 1990), https://archives.federalregister.gov/issue_slice/1990/2/1/3511-3517.pdf#page=6; Center for Science in the Public Interest (CSPI). *Red 3 Petition*. 2 (October 24, 2022). https://www.cspinet.org/resource/red-3-petition (last visited May 12, 2024).

[30] U.S. Food and Drug Admin., FDA to Revoke Authorization for the Use of Red No. 3 in Food and Ingested Drugs, (2025), https://www.fda.gov/food/hfp-constituent-updates/fda-revoke-authorization-use-red-no-3-food-and-ingested-drugs.

[31] Cal. Health & Safety Code § 109025 (2024).

[32] *See* HHS Secretary Kennedy Directs FDA to Explore Rulemaking to Eliminate Pathway for Companies to Self-Affirm Food Ingredients Are Safe, U.S. Dep't of Health and Human Services (March 10, 2025), https://www.hhs.gov/press-room/revising-gras-pathway.html.

[33] Kim Severson, *Kennedy Plans to Phase Our 8 Commonly Used Food Dyes*, New York Times (Apr. 21, 2025) https://www.nytimes.com/2025/04/21/dining/rfk-jr-food-dyes.html.

[34] Jonel Aleccia, Matthew Perrone, *US Health Officials Seek to Phase out Artificial Dyes from the Food Supply*, AP, (Apr. 22, 2025) https://apnews.com/article/fda-artificial-food-dyes-kennedy-6f6c1aa08aafdae1925718804f360c0b.

[35] U.S. Const. art. VI, cl. 2.

[36] U.S. Const. amend. X; *see, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("in all preemption cases, and particularly in those in which congress has 'legislated . . . in a field which the States have traditionally occupied,' we '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.'") (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

[37] *Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 516 (1992).

[38] *See id.*

[39] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Cipollone* 505 U.S. 504.

[40] *See Fidelity Fed. Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than Federal Statutes"); *La. Pub. Serv. Commn. v. FCC,* 476 U.S. 355, 374 (1986) ("A federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority . . . an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.").

[41] *See generally* 21 U.S.C. § 348 (on food additives); 21 U.S.C. § 379e (on color additives).

[42] Laurie J. Beyranevand & Diana Winters, *Retooling American Foodralism*, 44 Am. J.L. & Med. 489, 493 (2018).

[43] *See* 21 U.S.C. § 360k (establishing national uniformity for medical devices and preempting state requirements "different from, or in addition to" federal requirements); 21 U.S.C. § 379r (establishing national uniformity for nonprescription drugs and preempting state requirements "different from or in addition to, or that [are] otherwise not identical with" federal requirements); 21 U.S.C. § 379s(a) (preempting state requirements for the labeling or packaging of cosmetics that are "different from or in addition to, or

that [are] otherwise not identical with" federal requirements).

[44] 21 U.S.C. §347(a).

[45] Congress has repeatedly introduced, but has declined to enact, legislation prescribing national food safety uniformity. *See, e.g.*, National Uniformity for Food Act of 2005, H.R. 4167 (proposing an amendment to the FDCA that would prohibit states from enacting provisions, not identical to existing federal provisions, for adulterated food, unsafe color and food additives, and several other food safety issues); National Uniformity for Food Act of 2006, S. 3128 (proposing national uniformity for food safety warning labels). These proposed bills received considerable opposition from stakeholders and a majority of state attorneys general, who, in 2006 sent a joint letter to Congress explaining that, because "[f]ood safety has been largely a matter of state law and oversight" and "[s]tate and local agencies perform more than 80 per cent of food safety work," the National Uniformity for Food Act would "undercut[] states' rights and consumer protection." *See* Letter from Nat'l Ass'n of Attys Gen. to Members of Congress, Mar. 2, 2006. [https://advocacy.consumerreports.org/wp-content/uploads/2013/05/FoodSafety.pdf]. Congress has, however, enacted laws that expressly preempt other areas of food safety or labeling. *See* Pub. L. 101-535, 104 Stat. 2353, 2362–63 (codified at 21 U.S.C. § 343-1(a)) (enacted in 1990 to preempt state laws on standards of identity and the labeling of food "not identical to" federal standards or requirements); Pub. L. 104-170, 110 Stat. 1489, 1530–31 (codified at 21 U.S.C. § 346(a)(n)(4)) (enacted in 1996 to preclude states from "establish[ing] or enforc[ing] any regulatory limit on a qualifying pesticide chemical residue . . . unless [it] is identical to such qualifying Federal determination").

[46] Beyranevand, *supra* note 42 at 493 ("The existence of specific express preemption provisions within the Act has led courts to conclude that other matters were not to be preempted.").

[47] Congressional Research Service, *Federal Preemption: A Legal Primer* 18 (2019).

[48] *See generally id* at 18-22.

[49] *Id.* at 25 (referencing *Wyeth*, 555 U.S. 555, and noting that in that case, the Court held that federal law did not preempt a state failure-to-warn claim against a drug manufacturer even though the manufacturer's label complied with FDA requirements, reasoning that "it was possible for the manufacturer to strengthen its label for the drug without FDA approval.").

[50] *Id*: *see also Wyeth,* 555 U.S. 555 at 573 ("Wyeth has failed to demonstrate that it was impossible for it to comply with both federal and state requirements. The CBE regulation permitted Wyeth to unilaterally strengthen is warning").

[51] *Merrell Dow Pharms., Inc. v. Oxendine*, 649 A.2d 825, 828-29 (D.C. Cir. 1994) (citing cases that held FDA regulations and safety determinations "are intended to be minimum standards which do not conflict with state law which sets higher standards for due care and safety" (internal quotations omitted)); Pub. L. No. 87-781 §202, 76 Stat. 780, 793 (1962), 21 U.S.C. § 321 note (1988) ("[n]othing in the amendments made by the [1962 Amendments] to the Federal Food, Drug, and Cosmetic Act shall be construed as invalidating any provision of state law…unless there is a direct and positive conflict between such amendments and such provision of state law."); *see also Williams v. Coca Cola Co.,* No. 8:15-CV-1534, 2017 WL 1214503, *2 (N.D.N.Y. Mar. 31, 2017).

[52] 21 U.S.C. § 2104(a)(1).

[53] U.S. Food and Drug Admin., State Retail and Food Service Codes and Regulations by State, (Aug. 1, 2024), https://www.fda.gov/food/fda-food-code/state-retail-and-food-service-codes-and-regulations-state.

[54] *Williams* 2017 WL 1214503 at *2-3 (noting that although the FDA has approved the additive, "Coca-Cola is not required [under federal law] to use aspartame in its products", so nothing in the state law "would make it impossible for Coca-Cola to comply with the FDCA").

[55] *Id.* at *3.

[56] *See* Claudia M. Vetesi, Lena Gankin, & Mamie Tabet, Passing on Preemption: Ninth Circuit Holds That California's Sherman Law Is Not Impliedly Preempted, Morrison Foerster (Jul. 2024), https://classdismissed.mofo.com/topics/ninth-circuit-california-sherman-law-not-impliedly-preempted/; *Buckman Co. v. Plaintiffs' Legal Comm*., 531 U.S. 341, 350 n. 4 (2001)

[57] Olivia Backhaus & Melanie Benesh, *EWG analysis: Almost all new food chemicals greenlighted by industry, not the FDA*, Environmental Working Group (April 13, 2022), https://www.ewg.org/news-insights/news/2022/04/ewg-analysis-almost-all-new-food-chemicals-greenlighted-industry-not-fda; *see also, supra* Part II.

[58] U.S. Food and Drug Admin. How U.S. FDA's GRAS Notification Program Works, (reproduced from Food Safety Magazine) (Dec. 2005/Jan. 2006), https://www.fda.gov/food/generally-recognized-safe-gras/how-us-fdas-gras-notification-program-works (last visited Feb. 13, 2023).

[59] Press Release: Secretary Kennedy Embarks on MAHA Tour, U.S. Dep't of Health and Human Serv. (Apr. 4, 2025) https://www.hhs.gov/press-room/hhs-secretary-kennedy-embarks-maha-tour.html.

[60] U.S. Food and Drug Admin., Final Determination Regarding Partially Hydrogenated Oils, 80 Fed. Reg 34650 (June 17, 2015), https://www.federalregister.gov/d/2015-14883/p-25 (noting that substances like trans fat were allowed in food as GRAS under the "prior sanction" concept if they were used in foods prior to the 1958 enactment of the Food Additives Amendment); U.S. Food and Drug Admin. *Final Determination Regarding Partially Hydrogenated Oils (Removing Trans Fat).* (May 18, 2018), https://www.fda.gov/food/food-additives-petitions/final-determination-regarding-partially-hydrogenated-oils-removing-trans-fat.

[61] U.S. Food and Drug Admin *Final Determination Regarding Partially Hydrogenated Oils (Removing Trans Fat).* (May 18, 2018), https://www.fda.gov/food/food-additives-petitions/final-determination-regarding-partially-hydrogenated-oils-removing-trans-fat; Pomeranz, *supra* note 15 at 1064, 1066.

[62] New York City, for example, created a city-wide ban that went into effect in 2006. *See* Thomas J. Lueck & Kim Severson, *New York Bans Most Trans Fats in Restaurants,* NY Times (Dec. 6, 2006), https://www.nytimes.com/2006/12/06/nyregion/06fat.html

[63] *See* Sarah Romero, *Local Bans on Trans Fats: A New (and Legal) Way Forward,* Harv. L. & Pol'y Rev., https://journals.law.harvard.edu/lpr/online-articles/local-bans-on-trans-fats-a-new-and-legal-way-forward/#:~:text=We%20seem%20to%20have%20finally,effect%20on%20December%205%2C%202006; Richard G. Lyons, *Constitutionality of New York City's Health Regulations,* Seton Hall University Student Works. 521 (2014), https://scholarship.shu.edu/student_scholarship/521.

[64] Congressional Research Service, Federal Preemption: A Legal Primer 24 (2019), https://crsreports.congress.gov/product/pdf/R/R45825, (citing *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963)).

[65] *Id.* at 23 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

[66] *Marrache v. Bacardi U.S.A., Inc*., 17 F.4th 1084, 1095 (11th Cir. 2021) ("While the FDA has determined that grains of paradise is GRAS under the Food Additives Amendment…neither the Food Additives Amendment nor its implementing regulations require states to allow the sale of alcohol containing an additive once that additive is deemed GRAS.")

[67] *Id.* (finding that: (i) "the fact that grains of paradise can be included in alcohol under federal law does not mean that federal law mandates individual states to allow the sale of alcohol containing grains of paradise" and (ii) "although it would undoubtedly be inconvenient, Defendants could comply with both federal and state law by selling Bombay without grains of paradise in Florida while selling Bombay with grains of paradise in other states"). *See e.g. Williams*, 2017 WL 1214503 at *2-3 (noting that the presumption against conflict preemption "is especially strong in the area of food safety, a field of traditional state power", and upholding the state's ability to act more strictly in this space). In *Williams*, the court held that states are permitted to impose stricter food safety regulations that the federal government, finding that the FDA's approval of aspartame did not preempt a state tort law case against Coca Cola for injuries allegedly caused by the ingredient. *See id.* This holding indicates that there is no duty on the state to protect the use of ingredients that have been approved by the FDA. Similar to the field preemption analysis in this case, the court held that the manufacturer was not required by the FDA to use aspartame, so the state tort claim based on the use of the product could proceed, and there was no conflict between the state common law and the FDA's authority. *See id.*

[68] Cal. Health & Safety Code § 109025 (2023).

[69] Cal. Health & Safety Code § 109025 (2023).

[70] While FDA has promulgated "standards of identity" requiring certain standardized foods to meet specific regulatory requirements (e.g., milk and dinner rolls), the additives proposed in this bill are not required in any standardized foods. 21 C.F.R. §§ 131-169.

[71] *See supra* notes 41-46 and accompanying text

[72] *See, e.g.*, National Uniformity for Food Act of 2005, H.R. 4167, 109th Cong. (2005-2006) (proposing an amendment to the FDCA that would prohibit states from enacting provisions, not identical to existing federal provisions, among other things, unsafe color and food additives).

[73] 21 U.S.C. § 2205.

[74] 7 C.F.R. § 210 et seq; *National School Lunch Program Meal Pattern*, U.S. Dep't of Agriculture (July 1, 2024), https://www.fns.usda.gov/school-meals/nutrition-standards/nslp-meal-pattern.

[75] *See generally* 7 C.F.R. § 210 et seq.

[76] *USDA Policy Memo SP 15-2025, Enhancing Child Nutrition Program Meal Standards,* U.S. Dep't of Agriculture (June 2, 2025), https://www.fns.usda.gov/schoolmeals/enhancing-meal-standards ("While meals and snacks served through the child nutrition programs must meet minimum federal nutrition standards, additional state-level standards can further promote children's health.")

[77] *Federal Role in Education,* U.S. Dep't of Educ., Jan. 14, 2025), https://www.ed.gov/about/ed-overview/federal-role-in-education#:~:text=Education%20is%20primarily%20a%20State,requirements%20for%20enrollment%20and%20graduation.

[78] *See. e.g.,* Mass. Gen. Laws Ch. 111, § 223 (2024); NYC Public Schools, Prohibited Ingredients, 6, https://pwsblobprd.schools.nyc/prd-pws/docs/default-source/school-menus/prohibitedingredient.pdf?sfvrsn=93d87835 (last accessed Mar. 2, 2025).

[79] U.S. Dep't of Educ., Federal Role in Education (Jan. 14, 2025), https://www.ed.gov/about/ed-overview/federal-role-in-education#:~:text=Education%20is%20primarily%20a%20State,requirements%20for%20enrollment%20and%20graduation

[80] NYC Public Schools, Prohibited Ingredients 6, https://pwsblobprd.schools.nyc/prd-pws/docs/default-source/school-menus/prohibitedingredient.pdf?sfvrsn=93d87835 (last accessed Mar. 2, 2025)

[81] *Menu and Ingredient Guidelines,* Boston Public Schools, https://www.bostonpublicschools.org/bps-departments/food-and-nutrition-services/menu-and-ingredient-guidelines.

[82] Press Release, *Governor Patrick Morrisey Signs Food Dye Legislation into Law*, West Virginia Office of the Governor Patrick Morrisey (Mar. 24, 2025) https://governor.wv.gov/article/governor-patrick-morrisey-signs-food-dye-legislation-law.

[83] Press Release, *HHS Supports State Legislation Banning Harmful Food Dyes From School Lunches in West Virginia,* , U.S. Dep't of

Health & Human Services (Mar. 28 2025), https://www.hhs.gov/press-room/west-virginia-morrisey-ban-food-dyes-schools-snap.html.

[84] 7 C.F.R. § 210.10(1)(i) ("School lunches offered to children age 5 or older must meet, at a minimum, the meal requirements in paragraph (b) of this section.")

[85] S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025); Assemb. B. 4640, 2024-2025 Leg., Reg. Sess. (N.J. 2024); H.B. 1130, 2025-2026 Gen. Assemb., Reg. Sess. (Pa. 2025).

[86] S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025); Assemb. B. 4640, 2024-2025 Leg., Reg. Sess. (N.J. 2024); H.B. 1130, 2025-2026 Gen. Assemb., Reg. Sess. (Pa. 2025).

[87] *See, e.g.* 21 U.S.C. § 101.91(d) (State and municipal governments may not create labeling laws, rules, regulations, or other requirement that differ from the federal labeling statute for "gluten-free," "no gluten," "free of gluten," or "without gluten" claims).

[88] *See* 21 U.S.C. § 343-1.

[89] *Dunn v. Ancient Brands, LLC,* No. 5:21-CV-390, 2023 WL 6037853 (N.D.N.Y. Sept. 15, 2023) (citing NLEA § 6(c)(1)). *See also* Nutrition Labeling and Education Act, Pub. L. No. 101-535, Section 6(c)(1), 21 USC 343-1 note. - https://www.congress.gov/101/statute/STATUTE-104/STATUTE-104-Pg2353.pdf ("The Nutritional Labeling and Education Act of 1990 shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section 403(A) of the Federal Food, Drug, and Cosmetic Act.")

[90] *See infra* note 105 and accompanying text. Even where Congress has included express preemption clauses, such as for nutrition labeling under NLEA, courts have taken a nuanced and narrow view of these statutes and permitted localities to implement additional labeling, such as sodium warning labels (*see e.g*. Nat'l Rest. Ass'n v. New York City Dep't of Health & Mental Hygiene, 148 A.D.3d 169 (2017) (finding that a New York City regulation requiring warning labels on items high in sodium was not preempted by the Nutrition Labeling and Education Act (21 USC § 343))).

[91] *Select Committee on GRAS Substances (SCOGS),* U.S. Food and Drug Admin, https://www.hfpappexternal.fda.gov/scripts/fdcc/index.cfm?set=SCOGS&sort=Year_of_Report&order=ASC&showAll=true&type=basic&search=, (last accessed Mar. 2, 2025).

[92] *GRAS Notices,* U.S. Food and Drug Admin, https://www.hfpappexternal.fda.gov/scripts/fdcc/index.cfm?set=GRASNotices&sort=Date_of_closure&order=DESC&type=basic&search= (last accessed Mar. 6, 2025).

[93] *See, e.g.,* S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025); Assemb. B. 4640, 2024-2025 Leg., Reg. Sess. (N.J. 2025).

[94] S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025); Assemb. B. 4640, 2024-2025 Leg., Reg. Sess. (N.J. 2025).

[95] For example, in the case of reporting on student information in schools, schools are required to simultaneously report to both state and federal government. *See e.g. Consumer Information and School Reporting*, Federal Student Aid, (Jun. 5, 2022), https://fsapartners.ed.gov/knowledge-center/fsa-handbook/2020-2021/vol2/ch6-consumer-information-and-school-reporting;. Yufan Huang & Rose M. LeRoy, *Information and Reporting Services (IRS),* N.Y. State Dept. of Educ (May 30, 2024), https://www.nysed.gov/memo/information-reporting-services/reporting-2024-25-school-year-data.

[96] *How U.S. FDA's GRAS Notification Process Works,* U.S. Food & Drug Admin., (Feb. 9, 2018), https://www.fda.gov/food/generally-recognized-safe-gras/how-us-fdas-gras-notification-program-works

[97] S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025).

[98] S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025).

[99] *Antibiotic use in food animal ordinance,* San Francisco Department of the Environment, (last accessed Feb. 25, 2025). https://www.sfenvironment.org/antibiotic-use-food-animals-ordinance.

[100] *What Does FDA Regulate?,* Food and Drug Admin., https://www.fda.gov/about-fda/what-we-do/what-does-fda-regulate.

[101] 21 U.S.C. § 343.

[102] *See generally id*.

[103] 21 U.S.C. § 343(w).

[104] *See generally,* 21 C.F.R. §§ 101.1, 101.2, 101.3, 101.4, 101.5, 101.7, 101.9, 101.13, 101.14, 101.15. 101.18

[105] 21 U.S.C. § 343-1(a). The provisions of the FDCA identified in the NLEA that explicitly preempt states from issuing any nonidentical requirements are: §§341 and 343(g) (addressing standard of identity requirements); 343(c) (addressing labeling requirements for *imitation* foods); 343(e) (addressing labeling requirements for the name and place of business and net quantity of contents); 343(i)(2) (addressing labeling requirements for products with two or more ingredients and for products containing fruit or vegetable juice); 343(w) (addressing labeling requirements for major allergens); 343(x) (addressing labeling requirements for nonmajor allergens); 343(b) (considering product sold under the name of another food to be misbranded); 343(d) (considering products in containers that are made, formed, or filled as to be misleading to be misbranded); 343(f) (addressing requirements for the prominence of information on labels); 343(h) (addressing requirements for pasteurized foods, or food products with standard of quality or standards of fill of container prescribed by regulations; 343(i)(1) (requiring foods to be labeled by their common or usual name); 343(k) (requiring foods containing artificial flavoring, artificial color, or chemical preservative to disclose that fact on labels); 343(q) (addressing labeling requirements for nutritional information); 343(r) (addressing nutrient-based and health-related claims);

and 343(r)(5)(B) (exempting infant formulas, foods served at restaurants, and dietary supplement from the labeling requirements under 343(r)).

106 21 U.S.C. § 343; 343-1.

107 21 U.S.C. § 343(w).

108 21 U.S.C. § 343(k).

109 21 U.S.C. § 343(k).

110 Nutrition Labeling and Education Act, Pub. L. No. 101-535, § 6(c)(2)-(3), 104 Stat. 2353, 2364 (1990).

111 *See generally* 21 C.F.R. § 101.17.

112 21 C.F.R. § 101.17(9).

113 21 U.S.C. §2014(a)(1).

114 21 U.S.C. § 678.

115 *See generally Thornton v. Tyson Foods, Inc.,* 28 F.4th 1016, 1022-1028 (10th Cir. 2022).

116 *See id.* at 1020.

117 *See id.* at 1025-26 ("The FSIS has already determined that defendants' labels are not deceptive or misleading under federal law. So, the state law plaintiffs seek to rely on cannot be coextensive with federal law…for plaintiffs to succeed on their claims that the labels are deceptive and misleading under state law and therefore must be removed or changed would be a different requirement than what the FSIS already approved").

118 21 U.S.C. § 467e.

119 21 U.S.C. § 467e

120 *See generally Cohen v. ConAgra Brands, Inc.,* 16 F.4th 1283 (9th Cir. 2021)

121 *Id.* at 1285-86.

122 *See id* at 1287-88 ("A plaintiff who brings a state law claim that the approved label is false or misleading is seeking to impose a requirement different from the federal requirements. That state law claim is preempted by §467e, which bars plaintiffs from challenging the agency's application of the PPIA's mislabeling standards through state law claims.")

123 *Id.* at 1288-90.

124 TX SB 25, Sec. 431.0815, https://legiscan.com/TX/text/SB25/id/3247967/Texas-2025-SB25-Enrolled.html

125 Tex. Health & Safety Code Sec. 431.0815(d)(4); Tex. SB 25, https://legiscan.com/TX/text/SB25/id/3247967/Texas-2025-SB25-Enrolled.html

126 LA Rev. Stat. 40:661; L.A. SB 14, https://legis.la.gov/legis/ViewDocument.aspx?d=1421347

127 *N.Y.S. Rest. Ass'n v. N.Y.C. Bd. Of Health,* 556 F.3d 114, 130 (2d Cir. 2009) (internal quotations omitted)

128 *See generally Davidson v. Sprout Foods, Inc.,* 106 F.4th 842 (9th Cir. 2024)

129 The Sherman Act is California's food and drug safety law under the health and safety code. It creates private rights of action for consumers on claims that are largely analogous to the FDCA. *See* CA Health and Safety Code § 109875.

130 *See id.*

131 *Id.* at 852.

132 *See* 21 C.F.R. § 101.17. Specifically, 21 C.F.R. § 101.17 requires warning labels for the sale handling of shell eggs and on: (1) food packaged in self-pressurized containers; (2) food packaged in self-pressurized containers with halocarbon or hydrocarbon propellants; (3) food products containing or manufactured with chlorofluorocarbon or other ozone depleting substances; (4) products that are represented as weight reducing agents, as part of a diet plan, or as dietary supplements and derived more than 50% of their caloric value from protein; (5) dietary supplements containing iron or iron salts; (6) food products containing psyllium husk; and (7) juices that have not be processed to prevent, reduce, or eliminate pathogens.

133 21 C.F.R. § 101.17(9).

134 *Holk v. Snapple Beverage Corp.,* 575 F.3d 329, 336 (3rd Cir. 2009).

135 *Grocery Mfrs. Ass'n v. Sorrell,* 102 F.Supp.3d 583, 612, fn.16 (D. Vt. 2015).

136 *Post Foods, LLC v. Superior Ct.*, 235 Cal. Rptr. 3d 641, 645 (Ct. App. 2018*), as modified on denial of reh'g* (Aug. 15, 2018).

137 *Id.* at 651, 657.

138 *See generally id.*

139 *Id.* at 657 ("We conclude that...a Proposition 65 warning for acrylamide on breakfast cereals would pose an obstacle to the federal scheme and therefore is preempted by federal law"), *as modified on denial of reh'g* (August 15, 2018).

140 Judith Praitis, Amy Lally & Marshall Morales, *Federal Challenges to Proposition 65: New Paths to Litigation and Lessons for Challenging State Laws*, 34 Natural Resources & Environment 1 (Summer 2019), https://www.sidley.com/-/media/publications/nre_v034n01_feat08praitislallymorales.pdf?la=en&rev=8dcbb6c67bca44f99fa4ff3a3630f50c ("any finding of obstacle preemption

for Proposition 65 [] would be limited to the specific type of products involved.")

141 21 C.F.R. § 101.17.

142 21 C.F.R. § 101.17(d).

143 21 C.F.R. § 101.17(d).

144 *See generally* 21 C.F.R. § 101.14.

145 *C.f. Williams,* 2017 WL 1214503 at *2-3 ("Coca-Cola is not required [by the FDA] to use aspartame in its products" so nothing in the state law banning the use of aspartame "would make it impossible for Coca-Cola to comply with the FDCA.")

146 *Grocery Mfrs. Ass'n,* 102 F.Supp.3d 583, at 615-16 (finding plaintiffs failed to demonstrate that it is "physically impossible for a GE food product to be labeled with a 'clear and conspicuous' statement that it is 'produced with genetic engineering' [under state law] and also comply with the FDCA's mandatory labeling requirement," and noting that "not only does the FDA allow for voluntary GE disclosures, but, for illustrative purposes, the State has proffered a product label that demonstrates how dual compliance maybe achieved.")

147 *Id.* at 616 (finding plaintiff's claim that state law requiring GMO labeling "stands in the way of the ability of federal agencies…to administer the health and safety statutes they are charged with implementing" unpersuasive).

148 *Id.* (internal quotations omitted)

149 *Id.* at 617 ("[i]n areas of traditional state regulation, [the court] assume[s] that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest…Plaintiffs therefore fall short of plausibly alleging [obstacle preemption]").

150 *Id.*

151 *Holk,* 575 F.3d 329, at 336.

152 *New York v. Mt. Tobacco Co.*, 942 F.3d 536, 542 (2d Cir. 2019).

153 *See generally National Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

154 *See id.*

155 *Id.* at 391-92 ("[petitioners] would have us recognize an 'almost *per se*' rule against the enforcement of state laws that have 'extraterritorial effects' – even though this Court has recognized…that virtually all state laws create ripple effects beyond their borders…[l]ike the courts that faced this case before us, we decline…petitioners' incautious invitation[].")

156 *Id.* at 369 ("[t]oday, this antidiscrimination principle lies at the 'very core' of our dormant Commerce Clause jurisprudence. In its 'modern' cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws 'driven by…'economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") (internal quotations omitted).

157 *Id.* at 374.

158 *See e.g., National Shooting Sports Foundation, Inc. v. James,* 144 F.4th 98 (2d Cir. 2025).

159 *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 141-146 (1970).

160 *See Propyl Paraben*, Environmental Working Group, Apr. 8, 2015, https://www.ewg.org/research/propyl-paraben; *Potassium bromate*, Government of Canada (May 3, 2024), https://www.canada.ca/en/health-canada/services/chemical-substances/challenge/batch-9/potassium-bromate.html; *FDA to Revoke Authorization for the Use of Red No. 3 in Food and Ingested Drugs,* U.S. Food and Drug Admin., (Jan. 15, 2025), https://www.fda.gov/food/hfp-constituent-updates/fda-revoke-authorization-use-red-no-3-food-and-ingested-drugs; Zandleme Birino de Oliveira et al., *Synthetic Colors in Food: A Warning for Children's Health,* 27 Int. J. Enviro. Res. Public Health 682, May 27, 2024, https://pmc.ncbi.nlm.nih.gov/articles/PMC11203549/

161 *See, e.g.,* Pomeranz, *supra* note 15; Maricel Maffini et. al., *We are what we eat: Regulatory gaps in the United States that put our health at risk*, 15 PLOS Biology, (2017).

162 *See* Thiago Veiga Jardim et al., *Cardiometabolic disease costs associated with suboptimal diet in the United States: A cost analysis based on a microsimulation model,* 16 PLoS Med e1002981 (2019); https://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.1002981&type=printable (finding that diet-related cardiometabolic diseases cost around $50.4 billion annually); Elizabeth Frazão, *High Costs of Poor Eating Patterns in the United States, in* America's Eating Habits: Changes and Consequences 5-26 (U.S. Dep't of Agriculture, Economic Research Division, Agriculture Information Bulletin No. 750) (1999), https://ers.usda.gov/sites/default/files/_laserfiche/publications/42215/5856_aib750_1_.pdf?v=87282 (finding that healthier diets could prevent an estimated $71 billion per year in lost productivity, healthcare costs, and premature death); *see also Unhealthy Dietary Patterns Drive $8 trillion in annual hidden costs of global agrifood systems,* Food and Agriculture Organization of the United Nations (Aug. 11, 2024), https://www.fao.org/newsroom/detail/SOFA2024-8-trillion-in-annual-hidden-health-costs/en

163 *FDA to Revoke Authorization for the Use of Red No. 3 in Food and Ingested Drugs*, U.S. Food and Drug Admin., (Jan., 15, 2025), https://www.fda.gov/food/hfp-constituent-updates/fda-revoke-authorization-use-red-no-3-food-and-ingested-drugs.

164 The substances commonly proposed to be banned include Red Dye No. 3, BVO, potassium bromate, propyl paraben, Blue 1, Blue 2, Green 3, Red 3, Red 40, Yellow 5 and Yellow 6, titanium dioxide, butylated hydroxyanisole, azodicarbonamide and butylated hydroxytoluene. *See, e.g.,* S.B. 9, 95th Gen. Assemb., Reg. Sess. (Ark. 2025); Assemb. B. 4641, 2024-2025 Leg., Reg. Sess. (N.J.

2024).

[165] California School Food Safety Act, Assemb. B. 2316 (Cal. 2024).

[166] *See* H.B. 2164, 57th Leg., Reg. Sess. (Ariz. 2025); S.B. 69, 153rd Gen. Assemb., Reg. Sess. (Del. 2025); S.B. 14, 2025 Leg., Reg. Sess. (La. 2025); H.B. 0134, 114th Gen. Assemb., Reg. Sess. (Tenn. 2025); S.B. 314, 89th Leg., Reg. Sess. (Tex. 2025); H.B. 0402, 2025 Leg., Reg. Sess. (Utah 2025); H.B. 1910, 2025 Leg., Reg. Sess. (Va. 2025); H.B. 2354, 87th Leg., Reg. Sess. (W. Va. 2025).

[167] *See* S.B. 01239, 2025-2026 Gen. Assemb., Reg. Sess. (N.Y. 2025).

[168] *See e.g. FDA Update on the Post-market Assessment of Tara Flour*, U.S. Food & Drug Admin, (May 15, 2024), https://www.fda.gov/food/hfp-constituent-updates/fda-update-post-market-assessment-tara-flour#:~:text=Today%2C%20the%20U.S.%20Food%20and,is%20an%20unapproved%20food%20additive. (The FDA determined tara flour was not GRAS two years after it entered the market and circulated under the GRAS loophole, severely injuring 400 consumers).

[169] *See* S.B. 25, 89th Leg., Reg. Sess. (Tex. 2025); S.B. 14, 2025 Leg., Reg. Sess. (La. 2025); H.B. 1133, 2025-2026 Gen. Assemb., Reg. Sess. (Pa. 2025), Assemb. B. 550, 2025-2026 Leg., Reg. Sess. (Wis. 2025).

[170] This test is known as the "*Pike* balancing test." *Grocery Mfrs. Ass'n v. Sorrell,* 102 F.Supp.3d 583, 604, 606 (D. Vt. 2015). *See also Pike,* 397 U.S. 137 at 141-46 (weighing the burden on interstate commerce with the local benefits secured to determine whether a Commerce Clause violation occurred).

[171] *Grocery Mfrs. Ass'n,* 102 F. Supp.3d 583 at 608.

[172] *About Proposition 65*, State of California Office of Enviro. Health Hazards Assessment, https://oehha.ca.gov/proposition-65/about-proposition-65#:~:text=Proposition%2065%20requires%20businesses%20to,are%20released%20into%20the%20environment.

[173] Maria Kalaitzandonakes & William Ridley, *Food Manufactures' Decision Making Under Varying State Regulation,* 56 J. of Food Distribution Research 1-26 (Mar. 2025), https://www.fdrsinc.org/wp-content/uploads/2025/04/JFDR56.1_1_Kalaitzandonakes.pdf (demonstrating that manufacturers have navigated other state level requirements in the past, such as those imposed by Vermont (regulating labeling of genetically modified ingredients), California (regulating animal welfare), and Illinois (regulating labeling of products containing sesame); but also suggesting that the state regulation of additives could cause problems for manufacturers if there is not harmony between the laws).

State Regulation of Food Additives and Chemicals: Preemption, the Commerce Clause, and the Breadth of State Authority

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