UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL ASSOCIATION OF CONVENIENCE STORES, NEW YORK ASSOCIATION OF CONVENIENCE STORES, FOOD MARKETING INSTITUTE, and RESTAURANT LAW CENTER, *Plaintiffs*, v. NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, NEW YORK CITY BOARD OF HEALTH, DR. MARY TRAVIS BASSETT, in her official capacity as Commissioner of the New York City Department of Health and Mental Hygiene, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, and LORELEI SALAS, in her official capacity as Commissioner of the New York City Department of Consumer Affairs, *Defendants*.	17 Civ. 5324 (VM)

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN, INC. IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND DEFENDANTS' MOTION TO DISMISS

Adam R. Pulver (AP-1222)
Allison M. Zieve
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Amicus Curiae *Public Citizen, Inc.*

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INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, Congress enacted requirements for the disclosure of nutritional information for menu items in certain retail food establishments. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573-76 (2015). At the same time, Congress made clear that section 4205 does *not* completely displace the role of state and local governments in protecting consumers' interests in access to this information. To the contrary, in two ways, Congress made clear that it envisioned a role for state and local governments to enforce menu disclosure laws: first, through a provision that expressly allows states and localities to adopt laws that are "identical" to the federal requirements and, second, by specifying in section 4205(d) that section 4205 does *not* impliedly preempt any state or local law.

In 2015, the Food and Drug Administration (FDA) amended the Code of Federal Regulations to include detailed menu labeling requirements. 21 C.F.R. § 101.11. The City of New York then amended its health code to adopt identical requirements. N.Y.C. Health Code § 81.50 (Regulation 81.50). The requirements have not changed since.

In a May 2017 action currently being challenged under the Administrative Procedure Act, the FDA announced a delay in the compliance date for the existing menu labeling requirements until at least May 2018, because "these requirements *may* change" in a potential future rulemaking. FDA, Extension of Compliance Date, 82 Fed. Reg. 20,825, 20,827 (May 4, 2017).[1] Based on the FDA's announcement—which the FDA classifies as "a rule of procedure," *id.*, Plaintiffs here argue that the federal requirements have changed and thus the federal and City requirements are no longer "identical." They argue that the City therefore cannot enforce the requirements of Regulation 81.50.

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[1] *See Ctr. for Sci. in the Pub. Interest v. Price*, No. 17-cv-01085 (D.D.C., complaint filed June 7, 2017) (alleging delayed enforcement notice violates the Administrative Procedure Act).

If Plaintiffs are correct that the FDA delay changed the federal menu labeling requirements, that change was invalid since it did not comply with the notice-and-comment rulemaking requirements of the APA. Plaintiffs' argument is also inconsistent with FDA's statement that the delay is merely "procedural," not an alteration of the menu labeling requirements. Moreover, it contradicts clear case law holding that where states (or localities) adopt requirements that mirror federal requirements but enforce them differently than federal agencies, the identical state and federal requirements are not thereby deemed "not identical." Thus, here, where Plaintiffs do not dispute that Regulation 81.50 is identical in substance to 21 C.F.R. § 101.11, the City and federal requirements remain identical, notwithstanding the FDA's delay of the mandatory compliance date for those requirements. Accordingly, Regulation 81.50 is not preempted by the express terms of the statute. And because section 4205(d) explicitly precludes implied preemption, the Court need not consider Plaintiffs' other arguments.

Congressional intent is the touchstone of any preemption analysis. *Seven years ago* Congress mandated that consumers have access to nutritional information on menus, and that state and local governments should be able to enforce that right of access with their own menu labeling requirements, as long as they were identical to the federal requirements. The City's plan to do just that via enforcement of Regulation 81.50 is not preempted; the motion for a preliminary injunction should be denied, and Defendants' motion to dismiss should be granted.

INTEREST OF AMICUS CURIAE

Public Citizen is a non-profit consumer advocacy organization with members in every state, including more than 8,000 in New York. Public Citizen has a longstanding interest in fighting exaggerated claims of federal preemption of state and local health and safety regulation and defending consumers' rights to know information that affects their health. Public Citizen has

appeared as an amicus in numerous cases involving both preemption and federal food and drug labeling laws, including *New York State Restaurant Association v. New York City Board of Health*, 556 F.3d 114 (2d Cir. 2009), and 509 F. Supp. 2d 351 (S.D.N.Y. 2007) (challenge to predecessor regulations to those that are at issue in this action); *POM Wonderful, Inc. v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014) (arguing the Nutrition Labeling and Education Act (NLEA) does not preclude Lanham Act claims regarding food labeling); and *Holk v. Snapple*, 575 F.3d 329 (3d Cir. 2009) (arguing that NLEA forecloses implied preemption claims).

BACKGROUND

Consumers should have accurate information about the contents of the food they purchase. This principle has long motivated various state, local, and federal food labeling laws. *See*, *e.g.*, *United States v. Ninety-Five Barrels More or Less Alleged Apple Cider Vinegar*, 265 U.S. 438 (1924) (finding misleading label of apple cider vinegar violated 1906 Food and Drugs Act); *Plumley v. Massachusetts*, 155 U.S. 461 (1894) (involving prosecution for violating Massachusetts law prohibiting labeling of margarine as butter); Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990); *see also* Wallace G. Janssen, *The Story of the Laws Behind the Labels*, FDA Consumer (June 1981), https://www.fda.gov/aboutfda/whatwedo/history/overviews/uc.

In the past fifteen years, state and local governments around the country have recognized that customers have an interest in nutritional information about what they purchase to eat in a restaurant, just as they do when they select an item off of the supermarket shelf. As one researcher explained, "Without being provided calorie information for the foods we are eating, we are unable to make fully informed food choices because people are generally poor at estimating the number of calories in foods." Erica L. Wohldmann, *Examining the relationship*

between knowing and doing: training for improving food choices, 126 Am. J. Psych. 449, 450 (2013). From 2003 through 2015, dozens of states and localities considered and/or adopted laws to require that restaurants and other sellers of prepared foods disclose to consumers nutritional information about the products they sell. *See* National Conference of State Legislatures, Trans Fat & Menu Labeling Legislation (Jan. 2013), http://www.ncsl.org/research/health/trans-fat-and-menu-labeling-legislation.aspx; Ctr. for Sci. in the Pub. Interest, State & Menu Labeling Policies (Apr. 1, 2014), https://cspinet.org/resource/state-and-menu-labeling-policies.

In upholding the 2008 version of Regulation 81.50, the Second Circuit noted the consumer interests served by menu labeling requirements, explaining that the City enacted the rule to "(1) reduce consumer confusion and deception; and (2) to promote informed consumer decision-making so as to reduce obesity and the diseases associated with it." *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009). Numerous studies supported the City's conclusion that, without disclosure, "[c]onsumers neither know nor estimate accurately the calorie content of food purchased in restaurants." N.Y.C. Dep't of Health and Mental Hygiene & Bd. of Health, Notice of Adoption of a Resolution to Repeal and Reenact § 81.50 of the New York City Health Code (Jan. 22, 2008); *see also N.Y. State Rest. Ass'n*, 556 F.3d at 134-36 (discussing other research). Subsequent studies have reaffirmed this conclusion. *See, e.g.*, Jason P. Block, et al., *Consumers' estimation of calorie content at fast food restaurants: cross sectional observational study*, 346 BMJ 2907 (2013) (finding that majority of diners did not notice calorie disclosures not on menus and consistently underestimated the calories in items they ordered); Andrea Heintz Tangari, et al., *Weighing in on fast food consumption: the effects of meal and calorie disclosures on consumer fast food evaluations*, 44 J. Consumer Affairs 431,

448 (2010) (stating that "for consumers, the estimation of calories is a difficult and complex task in the current information environment").

By enacting nationwide labeling requirements, Congress sought to address the consumer information deficit. As the FDA noted in promulgating the current federal requirements, the requirements "give consumers much needed access to essential nutrition information for a large and growing number of the foods they purchase and consume." FDA, Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 79 Fed. Reg. 71,156, 71,161 (Dec. 1, 2014).

ARGUMENT

I. SECTION 4205 DOES NOT EXPRESSLY PREEMPT REGULATION 81.50.

In enacting Section 4205, Congress included an express preemption provision, now codified at 21 U.S.C. § 343-1(a)(4). That provision preempts state and local requirements for menu labeling that are "not identical" to those in Section 4205.[2] Because the requirements of Regulation 81.50 are identical to the statutory requirements of that section, as expanded upon in 21 C.F.R. § 101.11, the express preemption provision does not apply.

State requirements are "not identical to" federal requirements where the states "impose affirmatively different requirements that are not equivalent to, or fully consistent with, the

[2] "In all pre-emption 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." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal citations and marks omitted). Food labeling has historically been a field of state concern. *See, e.g., Plumley*, 155 U.S. 461. Thus, here, although the plain text of the express preemption provision makes Congress's intent clear, to the extent there is any ambiguity, the Court should construe it *against* a finding of preemption. *See, e.g.*, *N.Y. State Rest. Ass'n*, 556 F.3d at ("where the text of a preemption clause is ambiguous or open to more than one plausible reading, courts 'have a duty to accept the reading that disfavors preemption'" (quoting *Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005))).

labeling and packaging provisions of the FDCA specifically identified in the preemption clause." *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 283 (S.D.N.Y. 2014) (addressing similarly worded preemption provision in 21 U.S.C. § 343-1(a)); *see also Izquierdo v. Mondelez Int'l, Inc.*, No. 16-CV-04697 (CM), 2016 WL 6459832, at *4 (S.D.N.Y. Oct. 26, 2016). Under this, or any other, definition of "not identical to," the requirements of Regulation 81.50 are identical to the federal requirements in the statute and 21 C.F.R. § 101.11.[3] Those federal requirements were promulgated in 2014 via notice-and-comment rulemaking, with an effective date of December 1, 2015. 79 Fed. Reg. 71,156.[4] The effective date has passed and not been altered. Thus, today, the statute and the Code of Federal Regulations contain requirements that are in effect and "identical to" those in Regulation 81.50.[5]

The subsequent compliance date delays on which Plaintiffs rely did not alter the "requirements" of federal law. The federal menu labeling requirements can be changed either by notice-and-comment rulemaking or by congressional action. Neither has occurred.

[3] Although Plaintiffs repeatedly assert that the dispositive standard for the statutory phrase "not identical" is "not imposed by or contained in," *see, e.g.*, Pls.' Mem. at 15, that language comes from a FDA regulation entitled "Petitions requesting exemption from preemption for State or local requirements," which sets forth how state or local governments can obtain waivers for laws that they *acknowledge* are preempted. 21 C.F.R. § 100.1(c)(4). Regardless, Regulation 81.50 imposes the same requirements as those "contained in" the statute and 21 C.F.R. § 101.11.

[4] The requirements of the statute itself were effective upon enactment.

[5] The "effective date" of a regulation is the date on which the Code of Federal Regulations is amended. *See* Office of the Federal Register, National Archives and Records Administration, Document Drafting Handbook 3-7 (June 21, 2017), https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf. Once the effective date has passed, a new rulemaking would be required to change the regulation, including to rescind it or to revert to a previous version.

A. Congress has not altered the federal requirements.

Congress's only action on menu labeling since 2010 expressly did *not* change the requirements promulgated by the FDA. In 2015, Congress enacted an appropriations rider that temporarily prohibited the use of federal funds to "implement, administer, or enforce" the federal requirements until after the publication of FDA guidance—which the FDA has since issued. *See* Consolidated Appropriations Act, Pub. L. No. 114-113, § 747, 129 Stat. 2242, 2282 (2015). This rider purported neither to alter the existing final FDA regulation, nor to expand preemption of state or local requirements. Rather, the appropriations rider solely and explicitly delayed federal enforcement by restricting the spending of federal money for a period of time. Congress left the requirements themselves unchanged.

An instructive comparison involves enforcement of laws prohibiting use of marijuana. For several years, Congress has included language in the omnibus appropriations acts prohibiting the Department of Justice from spending funds to federally prosecute individuals who grow, sell, or use marijuana in compliance with state medical marijuana laws. *See United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016) (summarizing history of such appropriations riders); *see also United States v. Kleinman*, 859 F.3d 825, 831 (9th Cir. 2017) (noting continued applicability). Although this language precludes the Department of Justice from initiating certain prosecutions, the marijuana appropriations rider does *not* make the underlying conduct legal. *See*, *e.g.*, *Futurevision, Ltd. v. United States*, No. 17-MC-00041-RBJ, 2017 WL 2799931, at *2 (D. Colo. May 25, 2017) (noting that appropriations rider "does not formally alter marijuana's legal status"); *see also McIntosh*, 833 F.3d at 1179 n.5; *United States v. Gregg*, No. 13-CR-0024-TOR, 2015 WL 1757832, at *5 (E.D. Wash. Apr. 17, 2015). As these cases recognize,

prohibiting the spending of funds to enforce the federal prohibition and changing the law to allow the currently prohibited conduct are not the same.

Where Congress seeks to delay a substantive change of law, it knows how to do so. Indeed, in the very same appropriations law where it prohibited the use of funds to implement the menu labeling rule, Congress did so with respect to a regulation addressing partially hydrogenated vegetable oils. That language stated:

> No partially hydrogenated oils as defined in the order published by the Food and Drug Administration in the Federal Register on June 17, 2015 (80 Fed. Reg. 34650 et seq.) shall be deemed unsafe within the meaning of section 409(a) and no food that is introduced or delivered for introduction into interstate commerce that bears or contains a partially hydrogenated oil shall be deemed adulterated under sections 402(a)(1) or 402(a)(2)(C)(i) by virtue of bearing or containing a partially hydrogenated oil until the compliance date as specified in such order (June 18, 2018).

Pub. L. No. 114-113, § 754, 129 Stat. at 2284. There, by specifying that partially hydrogenated oils were not to be considered unsafe under the statute, Congress spoke to a substantive legal requirement. Here, Congress's decision not to address the substance of the regulation, but instead only to delay FDA enforcement for a period of time (now passed), further demonstrates that the requirements of federal law remain in effect.

B. FDA's delay could not lawfully change federal requirements.

If Congress does not change the requirements of law by directing non-enforcement, it is hard to see how an agency could do so by simply announcing a delay without first undertaking notice-and-comment rulemaking. Indeed, the FDA itself stated that the menu labeling requirements "may change" in the future—not that they "have changed" or "are changing." 82 Fed. Reg. at 20,827.

However the delay is characterized, it did not bring Regulation 81.50 within the scope of express preemption. First, to the extent that the delay effects a change to federal requirements,

the APA required notice-and-comment rulemaking to make that change. 5 U.S.C. § 553. In its notice, the FDA stated that, if notice-and-comment rulemaking would otherwise be required, it need not provide notice and an opportunity for comment because the change fell under the good cause exceptions set out in the APA, 5 U.S.C. § 553(b)(B) and (d)(3). *See* 82 Fed. Reg. at 20,827. But the proffered "good cause"—the desire to "reduc[e] regulatory burden"—is an insufficient reason to dispense with notice-and-comment rulemaking under well-established case law. *See, e.g., Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) ("[T]he 'good cause' exception is to be narrowly construed and only reluctantly countenanced. The exception is not an 'escape clause'; its use should be limited to emergency situations."); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (rejecting "approach [that] would give agencies 'good cause' under the APA every time a manufacturer in a regulated field felt a new regulation imposed some degree of economic hardship"); *see also Zhang v. Slattery*, 55 F.3d 732, 746 (2d Cir. 1995), *superseded on other grounds by statute*, 8 U.S.C. § 1101(a)(42). Because the FDA did not comply with the requirements of notice-and-comment rulemaking, any purported change in the requirements would be unlawful. *See id*. § 706(2)(D) (authorizing courts to "hold unlawful and set aside agency action" undertaken "without observance of procedure required by law").[6]

Alternatively, the FDA characterized the announcement of a delayed compliance date as a "rule of procedure," 82 Fed. Reg. at 20,827, and thus exempt from notice-and-comment requirements per 5 U.S.C. § 553(b)(A). A procedural rule, by definition, "does not itself alter the rights or interests of parties, although it may alter the manner in which the parties present

[6] As noted above, supra note 1, an action to vacate the FDA's delay on these grounds is currently pending.

themselves or their viewpoints to the agency." *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 168 (2d Cir. 2013).[7] Thus, if the agency was right to deem the delay procedural, Plaintiffs are wrong to assert that the delay altered federal requirements. *Cf. Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004) (noting agency "cannot have it both ways" and claim delay of rule was both procedural and of substantive significance).

Notably, after the FDA compliance date passes, the federal and local agencies may still make different decisions about when and whether to impose penalties for a violation of the identical requirements. Thus, to hold here that the agency's decisions about when to begin enforcement alters the requirements of federal law would defeat Congress's explicit intent to allow state and local governments to continue to play a role in the regulation of menu labeling. *See* 82 Fed. Reg. at 20,827 (equating compliance date with date on which the FDA would commence enforcement); *see also* FDA, A Labeling Guide for Restaurants and Retail Establishments Selling Away-From-Home Foods, 81 Fed. Reg. 27,067, 27,068 (May 5, 2016) (same). *Cf. Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 95 (2d Cir. 2012) ("[W]e must 'give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme.'" (quoting *California v. FERC*, 495 U.S. 490, 497 (1990))). To find that such differences make the "requirements" of the otherwise identical City and federal regulations non-identical would be to render meaningless Congress's express decision to allow identical local requirements.

Recognizing Congress's intent to provide a role for state and local government, courts have consistently held, with respect to a variety of statutes, that the fact that a state or local

[7] Substantive rules, on the other hand, "are ones which grant rights, impose obligations, or produce other significant effects on private interests or which effect a change in existing law or policy." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (citations omitted).

government has a different scheme for enforcing requirements identical to federal requirements does not make the two sets of requirements "not identical" and thus subject to preemption. In *Bates v. Dow Agrosciences LLC*, for example, under a statute that preempts state-law labeling requirements "in addition to or different from" federal requirements for pesticides, the Supreme Court held that the fact that federal law did "not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of [the Act's] labeling requirements" did not "preclude[] States from providing such a remedy." 544 U.S. at 447. Similarly, numerous courts have held that the "not identical to" language in the NLEA's nutrition labeling preemption provision, 21 U.S.C. § 343-1(a)(3), does not preempt a state damages action to enforce substantive requirements that mirror federal requirements. *See*, *e.g.*, *Silva v. Smucker Nat. Foods, Inc.*, No. 14-CV-6154 JG RML, 2015 WL 5360022, at *5 (E.D.N.Y. Sept. 14, 2015); *Ackerman v. Coca-Cola Co.*, No. CV-09-0395 (JG), 2010 WL 2925955, at *6 (E.D.N.Y. July 21, 2010); *In re PepsiCo, Inc., Bottled Water Mktg. & Sales Practices Litig.*, 588 F. Supp. 2d 527, 532 (S.D.N.Y. 2008).

As these cases recognize, different enforcement mechanisms do not render otherwise identical state and federal requirements non-identical. That is what is happening here. The City is opting to undertake enforcement of identical requirements that the federal government has opted to delay for a defined period.

II. SECTION 4205 DOES NOT IMPLIEDLY PREEMPT REGULATION 81.50.

A. Congress explicitly precluded implied preemption under Section 4205.

In determining whether implied preemption exists, as with express preemption, a court's "task is to determine whether, and to what extent, Congress intended to preempt state law." *Niagara Mohawk Power Corp.*, 673 F.3d at 95, quoted in *Figueroa v. Foster*, No. 16-1856-CV,

2017 WL 3137388, at *7 (2d Cir. July 25, 2017). Here, Congress's intent not to impliedly preempt state or local law is explicitly set out in a savings clause. Section 4205(d) states, in relevant part:

> Nothing in the amendments made by this section shall be construed—
>
> (1) to preempt any provision of State or local law, unless such provision establishes or continues into effect nutrient content disclosures of the type required under section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act (as added by subsection (b)) [the labeling requirements at issue in this case] and is expressly preempted under subsection (a)(4) of such section . . . .

P.L. 111-148, 124 Stat. at 576.[8] Put simply, Congress made clear that unless a menu labeling law is expressly preempted, it is not preempted.

This language has the same impact as that in the NLEA, Pub. L. No. 101-535, § 6(c), 104 Stat. 2535, 2364 ("The Nutrition Labeling and Education Act of 1990 shall not be construed to preempt any provisions of State law, unless such provision is expressly preempted under [§ 343-1] of the Federal Food, Drug and Cosmetic Act."). Numerous courts, including in a challenge to a previous version of Regulation 81.50, have held that this provision "precludes implied preemption of state regulations." *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, No. 08 Civ. 1000 (RJH), 2008 WL 1752455, at *4 (S.D.N.Y. Apr. 16, 2008), *aff'd on other grounds,* 556 F.3d 114 (2d Cir. 2009); *see also Holk v. Snapple Beverage Corp*., 575 F.3d 329, 336 (3d Cir. 2009) ("NLEA declares that courts may not find implied preemption based on any provision of NLEA"); *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 612, n.16 (D. Vt. 2015); *Smajlaj*

[8] Although section 4205(d) was not codified in the United States Code, it is part of the enacted statute. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am*., 508 U.S. 439 (1993) ("Though the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law, 1 U.S.C. § 204(a), it is the Statutes at Large that provides the 'legal evidence of law'[.]"); *see also Cohen v. JP Morgan Chase & Co*., 498 F.3d 111, 121 n. 7 (2d Cir. 2007).

v. Campbell Soup Co., 782 F. Supp. 2d 84, 92 n.2 (D.N.J. 2011); *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW AGRX, 2010 WL 11076030, at *2 (C.D. Cal. Sept. 16, 2010).

There is no reason to construe the language of section 4205(d) differently. In light of the clear Congressional intent to limit the preemptive effect of section 4205 to those state and local laws covered by the express preemption clause, there is no need for the Court to go any further in order to reject Plaintiffs' implied preemption claims.

B. Regulation 81.50 does not conflict with the federal menu labeling requirements.

Even if Congress had not expressly precluded the possibility of implied preemption in section 4205(d), Plaintiffs' implied preemption argument would fail. Plaintiffs rely on a number of cases applying what the Second Circuit has referred to as the "obstacle branch" of conflict preemption, which "is in play when state law is asserted to 'stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 101 (2d Cir. 2013) (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)) (alteration in original).

> The burden of establishing obstacle preemption [] is heavy: "the mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." Indeed, federal law does not preempt state law under obstacle preemption analysis unless "the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together."

In re MTBE, 725 F.3d at 101-02 (quoting *Madeira v. Affordable Hous. Found., Inc.,* 469 F.3d 219, 241 (2d Cir. 2006)); *see also Figueroa*, 2017 WL 3137388, at *9 (quoting *In re MTBE*). Plaintiffs have not met this heavy burden.

Plaintiffs suggest the City's enforcement of the federal standard would interfere with two "purposes and objectives." They assert an interest in "federal uniformity" based on the presence of the express preemption clause, Pls.' Mem. at 20, and they assert that Regulation 81.50

conflicts with the new administration's interest in considering ways "to minimize the regulatory burdens associated with the regulation," *id*. When considering preemption, however, "[t]he purpose of *Congress* is the ultimate touchstone." *Figueroa*, 2017 WL 3137388, at *9 (emphasis added). Plaintiffs' argument does not suggest any way in which Regulation 81.50 frustrates the purposes of achieving Congress's objective with respect to menu labeling or interferes with the authority delegated to the FDA with respect to menu labeling. The administration's general interest in minimizing regulatory burdens cannot defeat Congress's express direction in section 4205 and subsection 4205(d).

Moreover, although the presence of an express preemption clause does not necessarily bar implied preemption, *see Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000), courts recognize an "inference that an express pre-emption clause forecloses implied pre-emption." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995). Here, the limited scope of the express preemption clause—which expressly *saves* from preemption certain state and local requirements—demonstrates congressional *assent* to state and local requirements that mirror federal requirements, along with state and local enforcement of such requirements. The statute fully contemplated that businesses could face investigations and enforcement actions from state and local agencies. The City's enforcement of requirements identical to the federal requirements was thus explicitly contemplated by Congress and cannot reasonably be deemed a threat to a federal interest in uniformity.

The cases on which Plaintiffs rely are not to the contrary. In *Geier*, the Supreme Court held that a state-law duty to install airbags in all cars would conflict with the federal determination that a phase-in of a passive restraint requirement adopted by the Department of Transportation was necessary to engender "consumer acceptance." 529 U.S. at 875, 879. That

phase-in was itself set out in the CFR, and the Court found that it was integral to achievement of the agency's safety objectives. *Id*. at 875. Likewise, the four California district court cases involving partially-hydrogenated oils (PHOs) cited by Plaintiffs are distinguishable. *See* Pls.' Mem. at 19 (citing *Hawkins v. Kellogg Co.*, 224 F. Supp. 3d 1002 (S.D. Cal. 2016); *Hawkins v. AdvancePierre Foods, Inc.*, No. 15-cv-2309-JAH (BLM), 2016 WL 6611099 (S.D. Cal. Nov. 8, 2016); *Backus v. ConAgra Foods, Inc.*, No. C 16-00454 WHA, 2016 WL 3844331 (N.D. Cal. July 15, 2016); *Backus v. Nestlé USA, Inc.*, 167 F. Supp. 3d 1068 (N.D. Cal. 2016)). In those cases, the courts held that state-law claims that PHOs were unsafe were preempted by federal law, even though the FDA had issued a determination (not a regulation) stating that PHOs would no longer be considered "generally regarded as safe," with a "compliance date" of 2018. Key to each of the courts' reasoning was *congressional* language stating that "PHOs shall not be deemed unsafe under the FDCA until June 18, 2018." *Hawkins v. Kellogg Co.*, 224 F. Supp. 3d at 1012; *see also Backus*, 167 F. Supp. 3d at 1072-73. According to the courts, this language was "a clear step by Congress to preclude parties, like Plaintiff, from bringing suit against food manufacturers based on use of PHO." 224 F. Supp. 3d at 1012. Here, Congress has not taken any analogous "clear steps."

Neither Congress nor the FDA has rescinded or otherwise altered existing federal requirements. Because Regulation 81.50 is identical to those requirements, it is not preempted.

CONCLUSION

For the foregoing reasons and those explained by the City, Plaintiffs' motion for a preliminary injunction should be denied, and Defendants' motion to dismiss should be granted.

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Respectfully submitted,

/s/ *Adam R. Pulver*
Adam R. Pulver (AP-1222)
Allison M. Zieve
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Amicus Curiae *Public Citizen, Inc.*