To be argued by:
Bryan W. Pease
15 minutes requested

Albany County Clerk's Index No. 900607-24

New York Supreme Court
Appellate Division: Third Department

Case No.
CV-24-1310

In the Matter of

THE CITY OF NEW YORK,

Petitioner-Appellant,

For a Judgment Under Article 78 of the New York CPLR,

against

RICHARD A. BALL, as Commissioner of Agriculture and Markets of the State of New York, and the NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS,

Respondents-Respondents,

and

LA BELLE FARM, INC. and HVFG, LLC d/b/a Hudson Valley Foie Gras,

Intervenors-Respondents.

BRIEF FOR APPELLANTS ANIMAL PROTECTION AND RESCUE LEAGUE AND VOTERS FOR ANIMAL RIGHTS

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March 24, 2025

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PRELIMINARY STATEMENT

Local Law 202 is a valid exercise of home rule authority and police power to protect general welfare and public morals within the City, not regulate farm operations outside of the City.

In ordering the City not to enforce Local Law 202 as violating AML 305-a, the Department of Agriculture and Markets (DAM) rewrote both Local Law 202 and AML 305-a.

In order for a local law to be preempted, there must be explicit words in a statute that do the preempting, not an inferred legislative intent based on outcomes in other separate, unrelated cases involving different statutes in which the preemption was clear.

In its Decision, Order, and Judgment dated June 21, 2024, Supreme Court, Albany County (Hon. Richard M. Platkin, J.), held that "Local Law 202 was intended to protect the welfare of birds, rather than the health or safety of humans," and is therefore preempted by AML 305-a. (R-28.)

This ignores centuries of jurisprudence holding the legal basis for animal cruelty laws is protection of public morals, not animals who are not legal persons. Bans on the sale of products deemed to be cruelly produced are no different and are intended to protect the local public morals, not animals in a different jurisdiction. (*Nat'l Pork Producers Council v. Ross* (2023) 598 U.S. 356, 381.)

Such laws are based on "distaste" for or "disgust" with the prohibited product. (*Cavel Int'l, Inc. v. Madigan* (7th Cir. 2007) 500 F.3d 551, 557.) And their legitimacy is not undermined if the prohibited product was once permissible or remains in favor in other regions. (*See, e.g.*, *Cavel*, 500 F.3d at 552 ("[h]orse meat was until recently an accepted part of the American diet" and remains "a delicacy" in some countries).

Here, Local Law 202 rectifies exactly the problem identified, which is the disgust and moral revulsion people in the City are made to feel when force-fed products are advertised and sold at restaurants and retailers. (R-3124, ¶58; R-3168-3175, ¶¶172-177; R-3788-4627.)

Even if a motivating factor in passing Local Law 202 was also to reduce animal cruelty at farms outside of the City by not being complicit in such acts, this cannot transmogrify Local Law 202 into a law that "unreasonably restrict[s] or regulate[s] farm operations within agricultural districts" under AML 305-a.

Local Law 202 does not apply to "farm operations" and does not even restrict the sale of products by farms in the City, as it only applies to sales by local restaurants and retailers, not farms. (R-66.) The farms remain free to sell their products directly to consumers even in the City, which both do on their websites. (https://hudsonvalleyfoiegras.com/, last visited March 24, 2025; https://bellabellagourmet.com/, last visited March 24, 2025.) There are also a

number of distributors in the City that sell the farms' foie gras, one of which offered testimony at the legislative hearings concerning Local Law 202. (R-3689.)

A law that only regulates local restaurants and retailers in a city where there are no agricultural districts cannot be transformed into a law that regulates "farm operations within agricultural districts" simply because DAM wishes to make it so.

Nor can AML 305-a be remade into a license for DAM to strike down local laws it disagrees with *outside* of any agricultural district, due to indirect economic effects it may have on some farms elsewhere. Only the Legislature can do that.

SUMMARY OF LEGAL ARGUMENT

In finding that DAM's final order had a rational basis, Supreme Court went far beyond the text of AML 305-a, which only applies to local laws that "unreasonably restrict or regulate farm operations within agricultural districts," and inferred an unwritten meaning and purpose to preempt regulations of local retailers—not farm operations—far outside of any agricultural districts.

In reaching this result, Supreme Court cited federal and state caselaw regarding preemption but turned the actual holdings of those cases on their heads.

In each of the cases relied on by Supreme Court and Respondents, the result depended on the specific wording of the preemption language at issue. The courts repeatedly warned in each of these cases—as well as in other controlling authority—not to infer unwritten meaning into statutes as written.

Yet, Respondents and Supreme Court have done exactly that, selectively quoting language about direct and indirect effects that had to do with the particular statutes at issue in those cases, and transposed that language into AML 305-a to vastly overstate the types of laws AML 305-a supposedly preempts, despite such language appearing nowhere in the actual text of the statute.

By referring to cases involving different statutes in which the preemption language *was* broad and sweeping, and selectively quoting sentence fragments from those cases about direct and indirect effects that were actually based on the wording of the particular statute at issue, Respondents and Supreme Court erroneously claim there is some general overriding principle that *any* statute—no matter how it is worded—must be construed to have a vast preemptive effect on any activity touching the subject matter. However, this is exactly what each of these cases and other controlling precedent warn *against*, and instruct that the limits of preemption must be based on the wording of the actual statute at issue.

ARGUMENT

POINT I

PROPOSED INTERVENORS ARE INTERESTED PERSONS AND AGGRIEVED PARTIES

Proposed Intervenors Animal Protection and Rescue League (APRL) and Voters for Animal Rights (VFAR) are interested persons within the meaning of CPLR 7802(d) and aggrieved parties within the meaning of CPLR 5511.

Accordingly, Proposed Intervenors should be permitted to prosecute their own appeal alongside the City's appeal.

A. Supreme Court previously relied on VFAR's amicus filings

In the prior proceeding, *City of New York v. Ball,* Index No. 900460-23 ("*Ball 1*"), in which Supreme Court annulled DAM's previous final determination as arbitrary and capricious, VFAR also moved to intervene. Despite granting the Farms' motion to intervene even though Local Law 202 did not apply to the Farms at all and only to local restaurants and retailers, Supreme Court denied VFAR's motion to intervene but did grant it amicus status. (R-3112, ¶3.)

In its decision annulling DAM's final determination, Supreme Court specifically referred to VFAR's briefing regarding Respondents selectively quoting sentence fragments out of context from the legislative record, while failing to submit a complete record for review. (R-3112, ¶4; *Ball 1,* NYSCEF Doc. No. 98, p.12, fn4.)

Supreme Court also noted in its previous decision, "VFAR attempted to put into the record of this special proceeding more than 1,600 pages of the legislative history of Local Law 202 (see NYSCEF Doc Nos. 39-42), to which the Farms responded that VFAR's materials 'represent an *incomplete* presentation of the public hearing record, as they do not include committee reports or written comments' (Farms Opp at 25 n 5 [emphasis added])." (R-3112, ¶5.)

Thus, Supreme Court explicitly recognized VFAR's contribution as amicus in the prior proceedings, and Supreme Court's ruling was based on an issue that VFAR raised, which was the failure of DAM to include the full legislative record to support its final determination. (R-3112, ¶6.)

In its briefing in *Ball 1*, VFAR also pointed out that Petitioner and Respondents were all operating under the incorrect belief that Local Law 202 was a *total* ban on sale of foie gras from force fed birds in the City, when in fact it only applies to local restaurants and retailers. (R-3113, ¶7.)

Petitioners and Respondents have since both corrected their positions on this, but DAM failed to issue a corrected Interim Determination or give the City any opportunity to respond regarding DAM's new understanding prior to issuing its Second Final Determination that is challenged here. (R-3113, ¶8.)

B. Standing is to be liberally granted in Article 78 proceedings

CPLR 7802(d) is designed to provide a more liberal standard for intervention as of right and by permission than is afforded under the general provisions of CPLR 1012 and 1013. Intervention by permission under CPLR 1013 requires a "common question of law or fact," whereas the standard for Article 78 proceedings under CPLR 7802(d) is simply that the intervenor be an "interested person."

"[R]eliance on the requirements for granting intervention in an action

pursuant to CPLR 1012 is misplaced. CPLR 7802 (d) is the specific provision governing intervention in CPLR article 78 proceedings. CPLR 7802 (d) states that a court 'may allow other interested persons to intervene'. This subdivision grants the court broader power to allow intervention in an article 78 proceeding than is provided pursuant to either CPLR 1012 or 1013 in an action. [Citations]. The court has discretion to allow intervention in a CPLR article 78 proceeding at any time, provided the movant is an interested person." (*Elinor Homes Co. v. St. Lawrence* (2d Dep't 1985) 113 A.D.2d 25, 28.)

"It is certainly true that the standard for permissive intervention under CPLR 7802(d) is more liberal than that provided in CPLR 1013." (*Greater N.Y. Health Care Facilities Ass'n v. DeBuono* (1998) 91 N.Y.2d 716, 720.)

C. Proposed Intervenors are each an "interested person" under CPLR 7802(d) and an "aggrieved party" under CPLR 5511

Proposed Intervenors are each an "interested person" within the meaning of CPLR 7802(d), giving Proposed Intervenors standing to intervene in this action.

In addition, many of Proposed Intervenors' members are "interested persons," giving Proposed Intervenors standing to intervene in a representational capacity.

For purposes of this appeal, Proposed Intervenors are also an "aggrieved party" under CPLR 5511, by virtue of their motion to intervene having been

denied, and having standing under CPLR 7802(d) to challenge DAM's order. Proposed Intervenors are also aggrieved by the decision, order, and judgment being appealed herein and should be able to prosecute their own appeal under CPLR 5511 as a result, even if they had not moved to intervene in the underlying action.

Proposed Intervenors played a significant role in the passage of Local Law 202, making their interest real and substantial in the outcome of the proceedings, and beyond that of the general public. (R-3120, ¶48.)

VFAR drafted Local Law 202 with input from many stakeholders and community groups. (R-3121, ¶49.) VFAR met with over 30 city council offices, testified at committee hearings, met with the mayor's office staff, met with health committee staff and the speaker's legislative staff, sent dozens of emails to supporters to contact their council members, phone banked hundreds of supporters to contact their council members, held four volunteer educational events with hundreds of volunteers to train them on lobbying, designed and printed hundreds of educational packets for lawmakers and advocates, built and maintained a website supporting the ban (www.nycfoiegras.com), held weekly coalition calls for six months with coalition member organizations, drafted dozens of op-eds and letters to the editor, contributed $5,000 towards an independent, scientific opinion poll to show there was overwhelming public support for the ban, provided press briefings, and built and maintained social media presence on Instagram, Twitter, and

Facebook. (*Ibid.*)

APRL has worked to ban the sale of foie gras for animal cruelty reasons for over 20 years. (R-3121, ¶50.) In 2004, APRL was instrumental in helping pass California's ban on the sale of foie gras from force fed birds, and in 2019 APRL was part of the coalition led by VFAR that helped pass Local Law 202 and contributed $1,000 to the independent, scientific opinion poll showing overwhelming public support for the law. (*Ibid.*) APRL has also worked for decades to educate restaurants in NYC specifically about the cruelty of foie gras. This has included hiring a campaign coordinator in NYC in 2010 to systematically visit restaurants serving foie gras to provide them with information about the cruelty involved, as well as organizing protests and outreach events. APRL has members in NYC who fall within the zone of interests Local Law 202 is intended to protect, which includes both individuals who are psychologically harmed by witnessing such sales of products the City has deemed to be cruel, as well as restaurateurs who refuse to sell foie gras due to the cruelty involved and must compete in a marketplace with other restaurants that do cater to those who wish to purchase this item that the City has deemed offensive to public morals. (*Ibid.*)

DAM's order that the City not enforce Local Law 202 has frustrated APRL's mission and diverted its resources, as APRL must now continue to try to convince restaurants in NYC to voluntarily not sell this product of animal cruelty.

(R-3122, ¶51.) APRL has limited resources and conducts this campaign nationally. When a jurisdiction bans the sale of foie gras from force fed birds, this allows APRL to pursue its mission in other jurisdictions that have not passed such a ban. Thus, DAM's order is forcing APRL to continue expending resources in NYC, where the sale of foie gras from force fed birds is now supposed to be illegal already. APRL should not have to continue spending resources in NYC educating restaurants about the cruelty of foie gras or trying to convince restaurants not to sell it voluntarily, as such restaurants should already be required by law not to sell it, but for DAM's arbitrary and capricious order that the City not enforce the law. This is diverting APRL's resources from other jurisdictions that do not have such a ban and where its resources should instead be spent. (*Ibid.*) APRL is thus an "interested person" under CPLR 7802(d). (See, e.g., *Housing Rights Initiative, Inc. v. Elliman*, 2023 N.Y. Misc. LEXIS 77, *14, discussing "organizational standing based on diversion of resources"; *see also Nnebe v Daus* (2d Cir. 2011) 644 F.3d 147, 157 ("only a 'perceptible impairment' of an organization's activities is necessary for there to be an 'injury in fact.'")

> Where a party shows an injury "that falls within the 'zone of interests,' or concerns, which sought to be promoted or protected by [a] statutory provision" the Court of Appeals has found standing requirements to have been met (*US Bank N.A. v Nelson*, 36 NY3d 998, 1003, 139 N.Y.S.3d 118, 163 N.E.3d 49 [2020] [Wilson, J., concurring] quoting *Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 773, 573 N.E.2d 1034, 570 N.Y.S.2d 778 [1991]).

(*Housing Rights Initiative, Inc. v. Elliman*, 2023 N.Y. Misc. LEXIS 77, *13.)

> To the extent Moving Defendants may dispute whether the diversion of resources was "sufficient" to confer standing upon Plaintiff, that constitutes a triable issue of fact warranting denial of a CPLR § 3211(a)(3) pre-answer motion to dismiss (*Chen v Romona Keveza Collection LLC*, 208 AD3d 152, 160, 173 N.Y.S.3d 201 [1st Dept 2022] [holding where it is unclear from the record if standing exists, dismissal is improper]).

(*Housing Rights Initiative, Inc. v. Elliman*, 2023 N.Y. Misc. LEXIS 77, *14.)

Organizational standing based on diversion of resources and frustration of mission has been recognized in other jurisdictions as well. For instance, California's highest court has held that such diversion of resources even fulfills a statutory requirement for *pecuniary* harm to bring suit under California's unfair business practices statute. (*California Medical Assn. v. Aetna Health of California Inc*. (2023) 14 Cal. 5th 1075, 1082.)

Of course, pecuniary harm is not required for standing under CPLR 7802(d), and the harm to Proposed Intervenors here meets this lower standard as well.

DAM's actions in ordering the City not to enforce Local Law 202 has frustrated Proposed Intervenors' mission and diverted their resources, as Proposed Intervenors must now continue to expend resources on a problem that had been solved through the democratic process and enactment of a law. (R-3122, ¶52.) By

ordering the City not to enforce the law that VFAR drafted and both VFAR and APRL helped pass, Proposed Intervenors' mission to see that law enforced is directly impacted. (*Ibid.*)

Additionally, many of Proposed Intervenors' members fall within the zone of interests Local Law 202 is intended to protect. This gives Proposed Intervenors representational standing on behalf of their members. (R-3123, ¶53.)

Animal cruelty laws fall under the home rule authority and general police power of the City to promote and protect public morals. Violating such laws is not a crime against animals, which are not legal persons, but rather is a crime against the City and the people living in it. A ban on the sale of products of animal cruelty is functionally no different. The legally cognizable interest is in *people* not being exposed to the sale of products of cruelty by restaurants and retailers in the City. (R-3123, ¶54.)

In 2023, the high court upheld the constitutionality of California's Proposition 12, banning the sale of whole pork products from pigs who had been confined their entire lives in cages too small to move or turn around, regardless of where the farms were located, against a dormant Commerce Clause challenge brought by the National Pork Producers Council based on extraterritorial economic effects of the law. (*Nat'l Pork Producers Council v. Ross* (2023) 598 U.S. 356.) APRL was also instrumental in the passage of Proposition 12 and filed an amicus

brief with the high court supporting affirmance. (R-3123, ¶55.)

The high court held, "States may sometimes ban the in-state sale of products they deem unethical or immoral without regard to where those products are made (for example, goods manufactured with child labor)." (*Nat'l Pork Producers,* 598 U.S. 356, 381.) Such laws fall under general police powers to "promote…public morals." (*Ibid,* quoting *Western Union Tel. Co. v. James* (1896) 162 U.S. 650, 653, ellipses in original.) "And , at least arguably, Proposition 12 works in just this way—banning from the State all whole pork products derived from practices its voters consider 'cruel.'" (*Ibid.*)

The zone of interests to be protected by animal cruelty laws such as California's Proposition 12, or New York City's Local Law 202, is the promotion of public morals. Voters and their elected representatives within a jurisdiction—in this case a home rule municipality—have general police power to ban the sale of products the voters deem offensive and harmful to public morals. (R-3123-3124, ¶56.)

By helping enact Local Law 202, Proposed Intervenors sought to protect the rights of their members to not be exposed to such sales at restaurants and retail establishments in the City, and to promote and protect public morals in the City where Proposed Intervenors' members live and work. (R-3124, ¶57.)

The June 18, 2019 Committee on Health hearing transcript is replete with

testimony from dozens and dozens of VFAR members and members of the public describing how they are disturbed, sickened, saddened, angered, appalled, and outraged that restaurants in NYC were being allowed to profit from the sale of grossly enlarged livers of force-fed birds. (R-3124, ¶58; R-3168-3175, ¶¶172-177; R-3788-4627.)

The purpose of laws like Local Law 202 banning the sale of a product deemed to have been cruelly produced is to prevent such local harm in the City. (*Nat'l Pork Producers,* 598 U.S. 356, 381.)

Another purpose of Local Law 202 is to level the playing field so that restaurants that choose for ethical reasons not to sell foie gras from force fed birds do not face competitive disadvantages from less scrupulous restaurants that still desire to profit from this cruelty. (R-3124, ¶60.) While the vast majority of people do not consume foie gras, those that do wish to consume this item at a restaurant will logically only eat at restaurants that sell it, causing restaurants that refuse to sell this item to lose out on potential business. (*Ibid.*)

Thus, restaurants that refuse to sell foie gras for ethical reasons also fall within the zone of interests Local Law 202 is intended to protect. The City has made a policy judgment that no restaurant should be serving this item, and thus all restaurants should be free to compete for business without the serving of foie gras being a factor customers may consider. (R-3124-3125, ¶61.)

Proposed Intervenors have members who own and/or manage such restaurants in the City, who are "interested persons" under CPLR 7802(d), giving Proposed Intervenors representational standing to intervene on these members' behalf. (R-3125, ¶62.)

Proposed Intervenors also have at least one restaurateur member who sells and markets a plant-based, cruelty-free version of foie gras. (R-3125, ¶63.) Local Law 202 represents a value judgment by the City to encourage such sales, which are now being undermined by the continued sale of foie gras from force fed birds at other restaurants. This member would also have standing to intervene in its own right as an "interested person" under CPLR 7802(d), giving VFAR representational standing on behalf of this member as well. (*Ibid.*)

> An organization can establish standing in several ways. Under the standard established in *Society of Plastics* (*see* 77 NY2d at 775), it may demonstrate 'associational standing' by asserting a claim on behalf of its members, provided 'that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members' (*Novello*, 2 NY3d at 211). Alternatively, an organization can demonstrate 'standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy' (*Warth v Seldin*, 422 US 490, 511, 95 S Ct 2197, 45 L Ed 2d 343 [1975]; *see Society of Plastics*, 77 NY2d at 772-773). Under this option, an organization—just like an individual—must show that it has suffered an 'injury in fact' and that its concerns fall within the 'zone of interests' sought to be protected by the statutory provision under which the government agency has acted (*see Society of Plastics*, 77 NY2d at 774-775; *Matter of Colella v Board of Assessors of County of Nassau*, 95 NY2d 401, 409-410, 741 NE2d 113, 718 NYS2d 268 [2000]).

(*Matter of Mental Hygiene Legal Serv. V Daniels* (2019) 33 N.Y.3d 44, 51.)

"[A]n organization can 'show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members.'" (*New York State Assn. of Nurse Anesthetists v Novello* (2004) 2 NY3d 207, 211, 810; *accord, Matter of Spence v New York State Off. Of Mental Health* (3d Dept. 2022) 211 AD3d 1430, 1431-1432.)

Proposed Intervenors' petition also explains the aesthetic and quality of life issues being suffered by their members and compassionate members of the public who are disturbed and outraged by local retailers and restaurants profiting from the sale of a product of extreme animal cruelty. (R-3168-3175.) Such "aesthetic or quality of life type of injuries have consistently been recognized by the courts as a basis for standing." (*Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Planning Comm'n* (1st Dep't 1999) 259 A.D.2d 26, 32.)

"It is enough to allege the adverse effect of the decision sought to be reviewed on the individuals represented by the organization (*Matter of Douglaston Civic Assn. v Galvin*, 36 NY2d 1, 7); the complaint need not specify individual injured parties. (*National Organization for Women v State Div. of Human Rights*, 34 NY2d 416.)" (*Dental Soc. Of New York v. Carey* (1984) 61 N.Y.2d 330, 334.)

D. Intervention may be granted at any time, including after judgment for purposes of appeal

Supreme Court denied Proposed Intervenors' motion to intervene on timeliness grounds but did not make any findings regarding prejudice, or any reason why Proposed Intervenors' papers could not be considered when they were submitted. At the time Proposed Intervenors filed their motion, the parties were still engaged in motion practice regarding the submission of amicus briefs. Thus, on May 8, 2024, DAM filed an opposition to the motion for leave to file an amicus brief filed by 350NYC, Animal Legal Defense Fund, CUNY Urban Food Policy Institute, and Food Chain Workers Alliance. (R-2998.) On May 9, 2024, the Farms filed a separate opposition to the same motion. (R-3007.) On June 7, 2024, DAM and the Farms each filed separate oppositions to the motion filed by They All Want to Live, Inc. to file an amicus brief. (R-3066, 3077.) Only 10 days later, Proposed Intervenors filed their motion to intervene and supporting papers. (R-3108.)

"The court has discretion to allow intervention in a CPLR article 78 proceeding at any time, provided the movant is an interested person (*see, Matter of Elinor Homes Co. v St. Lawrence*, 113 AD2d 25)." (*Doyle & Doyle v. Rush* (2d Dep't 1997) 241 A.D.2d 494, 494.)

In *Borst v International Paper Co.* (2014) 121 A.D.3d 1343, 1347, this Court reversed denial of a motion to intervene in an Article 78 proceeding after the

order in the proceeding was issued but before final judgment was entered.

Intervention in an Article 78 proceeding "may be granted at any point of the proceeding, including after judgment for the purposes of taking an appeal." (*Matter of People v. Schofield* (2021) 199 A.D.3d 5, 9, internal quotations and citations omitted.)

"The 'interested persons' standard of CPLR 7802(d) is 'more liberal than that provided in CPLR 1013' for intervention in other civil actions. [Citations]." (*Ibid.*)

"This Court is 'vested with all the power of Supreme Court to grant [a] motion for intervention,'" and "may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation." (*Ibid,* citations omitted.)

E. Allowing intervention would cause no prejudice to any party

"A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." (CPLR 203(f).)

"Generally, relation back of the claims of an intervening party will be permitted when that party is imposing claims which are "the same as or similar to" those set forth in the original complaint (*State of New York v General Elec. Co., supra*, at 598). Among the factors that may be considered in making this determination are whether the substance of the new claims is the same as those asserted in the original complaint or petition, whether the addition of the new claims does not change the potential liability of the defendants and whether the new party is related to the original plaintiff or petitioner (*Key Intl. Mfg. v Morse/Diesel, Inc*., 142 AD2d 448, 458-459)." (*Greater N.Y. Health Care Facilities Ass'n v. DeBuono* (1st Dep't 1997) 242 A.D.2d 211, 213.)

Further, "a party may be permitted to intervene and to relate its claim back if the proposed intervenor's claim and that of the original petitioner are based on the same transaction or occurrence. Also, the proposed intervenor and the original petitioner must be so closely related that the original petitioner's claim would have given the respondent notice of the proposed intervenor's specific claim so that the imposition of the additional claim would not prejudice the respondent." (*Id.* at 721.)

Proposed Intervenors' petition relies on facts that are in the record, and includes just two causes of action, which the City also includes in its petition. It would not prejudice Respondents to deny the allegations contained in Proposed

Intervenors' petition just as they have denied the allegations in the City's petition alleged under the same causes of action.

On the other hand, Proposed Intervenors would be prejudiced if the law they helped pass and fall within the zone of interests the law is intended to protect are unable to participate in this proceeding.

Like in *Schofield, supra,* "respondents cannot credibly claim surprise or prejudice arising from the assertions" of Proposed Intervenors.

POINT II

DAM ACTED IN EXCESS OF ITS JURISDICTION AND THE FINAL DETERMINATION IS *ULTRA VIRES*

A plain reading of Local Law 202 shows that it does not impose any requirements or restrictions whatsoever on any entity outside of the City, or even within the City unless such entity is a local retail or food service establishment. (R-66.) Thus, Local Law 202 does not apply to any farms or farm operations, does not apply in any agricultural district, and DAM lacked jurisdiction to order the City not to enforce Local Law 202.

To the extent Respondents contend Local Law 202 is invalid due to exceeding the *City's* jurisdiction to pass laws, this is outside the scope of DAM's order issued under AML 305-a, and is also illogical given that Local Law 202 only applies to restaurants and retailers within the City.

"It is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency…If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. [Citations]." (*Scherbyn v. Wayne-Finger Lakes Bd. Of Coop. Educ. Servs*. (1991) 77 N.Y.2d 753, 758.) Accordingly, Respondents' purported jurisdictional challenge to their fictitious version of Local Law 202 cannot be bootstrapped into DAM's Final Determination, which is entirely based on supposed violation of AML 305-a, and not a general challenge to the City's jurisdiction to pass laws that may have indirect economic effects outside of the City.

A. DAM misrepresents the language of its own brochure in an attempt to manufacture any kind of precedent for its current position

Lacking any support in the record for DAM having jurisdiction to review laws outside of agricultural districts, Respondents have misrepresented a DAM brochure, "Local Laws and Agricultural Districts: How Do They Relate?" (R-2949.)

The line in the DAM brochure quoted out of context by Respondents is: "A reasonable exercise of authority in one locality may translate into an unduly burdensome restriction on farming in another." (R-114, top right first full sentence.)

The line appears at the end of a section discussing how certain local restrictions "may be entirely reasonable under usual conditions," but nonetheless in specific circumstances may be "unreasonably restrictive if applied," and then gives a specific example. (R-114, bottom left paragraph.)

Thus, the reference to "reasonable exercise of authority in one locality" clearly means *as compared* to the *same* restriction being *un*reasonable as applied in a different locality under specific circumstances, and goes on to say "reasonableness depends on the totality of circumstances in each case." (R-114.)

This line in DAM's brochure does not mean that a law in one jurisdiction may be reviewed for its effects in another jurisdiction that has not enacted the law and which has no agricultural districts. The "may translate into" language clearly refers to a situation in which the same language contained in one restriction is enacted in a different jurisdiction with different circumstances and therefore may have different effects in that other jurisdiction.

The concept actually explained in the DAM brochure, that two local laws in different localities that are the same on their face may nonetheless be unreasonable as applied in one of the localities but not the other, does not mean that a law enacted one jurisdiction can be reviewed for its indirect effects in a different jurisdiction that has not enacted such a law. The brochure does not state this, and there is no legal support for Respondents' litigation position regarding DAM's

brochure supposedly stating this.

In fact, there is no evidence that DAM has ever before contemplated reviewing a municipality's laws where there are no agricultural districts at all, based on indirect financial impacts in an entirely different locality.

All that this one line in DAM's brochure indicates is that just because one locality has a particular law or regulation does not automatically mean the same law or regulation will be reasonable as applied if enacted in another locality. Respondents are now taking that line out of context and turning it on its head to claim it really means that one locality's *own* laws can be reviewed for supposed indirect impacts on another locality that has not enacted the law.

B. DAM's position would lead to absurd results

If AML 305-a is interpreted in the extreme manner suggested by Respondents, *any* local law could always be found to have some indirect effect on a farm's financial bottom line somewhere else. Even a law intended to *protect* or *support* agriculture in one jurisdiction could be seen as violating AML 305-a under such a reading, because such laws could cause competitive economic pressure on farms in other jurisdictions.

DAM lacks jurisdiction to block the City from exercising its general police powers to protect public health, safety, morals, and general welfare by banning the sale of grossly enlarged livers of force fed birds at local food service and retail

establishments within the City, which is all that Local Law 202 does.

Accordingly, DAM's Second Final Determination ordering the City not to enforce Local Law 202 must be set aside as *ultra vires* and as exceeding Respondents' jurisdiction.

In *Town of Riverhead v Baiting Hollow Farms, LLC,* 2017 N.Y. Misc. LEXIS 2714, *8, a farm claimed that operating a winery outside of an agricultural district fell under AML 305-a review, much like Respondents here argue that regulation of sales activities of third party restaurants and retailers in a different city are subject to AML 305-a review based in indirect economic effects. In ruling that operation of the winery did not fall under AML 305-a, Supreme Court noted, "Nowhere in the record submitted does it appear that the property lies within an 'agricultural district' created by the county legislature." (*Town of Riverhead v Baiting Hollow Farms, LLC*, 2017 N.Y. Misc. LEXIS 2714, *8.)

DAM has also included an affidavit of Michael Latham making various vague and conclusory statements about past actions supposedly taken by DAM that involved review of a local law outside of an agricultural district. (R-2903, ¶35.) However, Mr. Latham does not state that the jurisdictions in which the local laws were reviewed did not have any agricultural districts, and DAM provides no further details. Mr. Latham also states these issues "were resolved without the issuance of a determination and order," which sheds no light whatsoever on

whether DAM ever determined such review was appropriate in the first place. Accordingly, these self-serving and vague assertions should be disregarded.

Supreme Court held that "broadly construing the literal language of AML § 305-a to extend to a sales ban like Local Law 202 would not defeat the 'intent and purpose' of the statute or 'lead to absurd or unreasonable consequences." Supreme Court then went on to list a parade of horribles that would supposedly occur if cities were permitted to exercise their home rule authority in the traditional manner in which such authority has always been exercised, which is for the protection of public health, safety, morals, and general welfare.

Each of the items Supreme Court found to be "easy to imagine municipalities using similar bans to indirectly restrict farming practices they deem objectionable or undesirable" would constitute a separate political decision which home rule municipalities are absolutely empowered to make. (*Nat'l Pork Producers,* 598 U.S. 356, 381 ("States may sometimes ban the in-state sale of products they deem unethical or immoral without regard to where those products are made…derived from practices its voters consider 'cruel.'" (*Ibid.*)

The City has the same authority under state law. (N.Y. Const., art. IX, §3(c); Municipal Home Rule Law §§ 50–51.)

Supreme Court instead wishes for DAM and the courts to substitute their judgment for what laws cities may pass within their own jurisdictions to regulate

local retailers, based on indirect economic effects on agriculture upstream in the supply chain, in a manner that has been soundly rejected by the high court. (*Va. Uranium, Inc. v. Warren* (2019) 587 U.S. 761, 767.)

POINT III

DAM'S FINAL DETERMINATION WAS ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION, AND AFFECTED BY ERRORS OF LAW

A. AML 305-a Does Not Apply to Local Law 202

Local Law 202 regulates sales by local restaurants and retailers—not "farm operations"—entirely outside of any agricultural districts. AML 305-a, by its own language, only applies to local laws that "unreasonably restrict or regulate farm operations within agricultural districts."

Thus, DAM abused its discretion in ordering the City not to enforce Local Law 202 as a local law that "restrict[s] or regulate[s] farm operations within agricultural districts" under AML 305-a.

1. Respondents misconstrue federal caselaw on preemption

a. Respondents misconstrue *National Meat v. Harris*

Respondents rely primarily on *National Meat Association v. Harris* (2012) 565 U.S. 452 ("*National Meat*") to support their position, which Supreme Court refers to as the "leading federal case," but the facts do not even remotely line up

here. (R-21.) Further, as discussed Point III(A)(1)(b), *infra,* the high court has recently ruled definitively that the manner in which Supreme Court applied and interpreted the preemption clause in *National Meat* is improper and incorrect.

In *National Meat,* there was no question the slaughterhouses were going to continue operating, and the question was which contradictory regulations they would be subject to when handling a non-ambulatory animal—state or federal. The state law at issue required the slaughterhouses to restructure their entire operations in a manner entirely different from a detailed federal regulatory scheme.

In holding the state law was preempted, the high court explained:

> The FMIA's preemption clause sweeps widely–and in so doing, blocks the applications of §599f challenged here. The clause prevents a State from imposing any additional or different–even if non-conflicting–requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations. **And at every turn §599f imposes additional or different requirements on swine slaughterhouses:** It compels them to deal with nonambulatory pigs on their premises in ways that the federal Act and regulations do not. In essence, California's statute substitutes a new regulatory scheme for the one the FSIS uses. **Where under federal law a slaughterhouse may take one course of action in handling a nonambulatory pig, under state law the slaughterhouse must take another.**

(*National Meat,* 565 U.S. 452, 459-460, emphasis added.)

In the present case, there is no state law mandating that cities must allow force feeding or the sale of products of force feeding, nor any state regulatory scheme regarding how farms should and should not feed animals on a farm. This is

a crucial distinction between the present case and *National Meat,* in which federal law expressly preempted exactly the types of restrictions the state was attempting to impose on slaughterhouses.

The additional prohibition on the *sales* of meat from nonambulatory animals in *National Meat* was not considered in isolation but rather in conjunction with the rest of the law operating as a command to the slaughterhouses to restructure their operations in a way that federal law expressly preempted. This was due to the way the sales ban functioned along with the rest of the law as a whole, which is why the high court found the sales ban to be preempted there too.

There is no such detailed regulatory scheme in the present case preventing cities from enacting "any additional or different—even if non-conflicting—requirements" regarding foie gras, and no express preemption by a state law regarding how foie gras farms are to operate. (*National Meat,* 565 U.S. 452, 459-460.) The only state law at issue is one which allows review of local laws that "unreasonably restrict or regulate farm operations within agricultural districts." (AML 305-a.)

The express preemption provision at issue in *National Meat* stated, "Requirements within the scope of this [Act] with respect to premises, facilities and operations of any establishment at which inspection is provided under . . . this [Act], **which are in addition to, or different than those made under this [Act]**

may not be imposed by any State." (*National Meat,* 565 U.S. 452, 458, emphasis added, brackets and ellipses in original.)

"The FMIA's preemption clause sweeps widely–and in so doing, blocks the applications of §599f challenged here. The clause prevents a State from imposing any additional or different–even if non-conflicting–requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations. And at every turn §599f imposes additional or different requirements on swine slaughterhouses." (*Id.* at 459-460.)

"The FMIA regulates slaughterhouses' handling and treatment of nonambulatory pigs from the moment of their delivery through the end of the meat production process. California's §599f endeavors to regulate the same thing, at the same time, in the same place except by imposing different requirements. The FMIA expressly preempts such a state law." (*Id.* at 468.)

Thus, the result in *National Meat* was required by the broad, sweeping, and all-encompassing language of the federal law at issue preempting the state law. No such language is present in AML 305-a, and indeed the language of AML 305-a is clear on its face that its force and effect is explicitly limited to laws restricting or regulating "farm operations within agricultural districts."

b. Recent U.S. Supreme Court precedent soundly rejects Respondents' application of *National Meat v. Harris*

The high court has soundly rejected the application of *National Meat* urged by Respondents here to infer some unwritten meaning into a statute and find preemption where none exists. In *Va. Uranium, Inc. v. Warren* (2019) 587 U.S. 761, the high court upheld a state ban on mining uranium, even though the ban was based on safety concerns regarding later stages in the process which were already fully regulated by federal law. The high court found it was within the state's general police power to do so, despite federal law preempting any regulation of the later stages of the process, which the state sought to avoid entirely by banning the mining in the first place.

"Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." (*Va. Uranium, Inc. v. Warren* (2019) 587 U.S. 761, 767.)

"Here, no more than in any statutory interpretation dispute, is it enough for any party or court to rest on a supposition (or wish) that 'it must be in there somewhere.'" (*Va. Uranium, Inc. v. Warren* (2019) 587 U.S. 761, 767.)

"And to order preemption based not on the strength of a clear congressional

command, or even on the strength of a judicial gloss requiring that much of us, but based only on a doubtful *extension* of a questionable judicial gloss would represent not only a significant federal intrusion into state sovereignty. It would also represent a significant judicial intrusion into Congress's authority to delimit the preemptive effect of its laws. Being in for a dime doesn't mean we have to be in for a dollar." (*Id.* at 773, emphasis in original.)

"In light of all this, it can surprise no one that our precedents have long warned against undertaking potential misadventures into hidden state legislative intentions without a clear statutory mandate for the project." (*Id.* at 776.)

"No more than in field preemption can the Supremacy Clause be deployed here to elevate abstract and unenacted legislative desires above state law; only federal laws 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect." (*Id.* at 778.)

"[W]e may only wind up displacing perfectly legitimate state laws on the strength of 'purposes' that only we can see, that may seem perfectly logical to us, but that lack the democratic provenance the Constitution demands before a federal law may be declared supreme." (*Id.* at 778.)

Supreme Court did exactly this in finding it likely the Legislature *would have* preempted such a local sales ban had it predicted this, and then fashioning a

ruling based on the hypothetical and actually non-existent preemption of local sales bans regulating third parties outside of agricultural districts. (R-27.)

In the present case, after inventing what the Legislature might have done had it actually wished to preempt local sales bans on products a city deems immoral, Supreme Court concludes by stating that "the Legislature is free to recalibrate the statutory balance to allow for consideration of the animal-welfare concerns that animated the adoption of Local Law 202." (R-34.) However, the statutory balance *already* allows the City to pass laws like Local Law 202, and the Legislature would need to expressly preempt such a law in order to invalidate it, rather than the inverse of needing to expressly allow such a law to be passed before the City can enact it.

c. Respondents misconstrue other federal cases

As another example of referring to a prohibition that *actually* exists in some specific statute or constitutional provision, and improperly transposing that as a basis to read it into an entirely different statute where such a provision is not present, Supreme Court invokes *NRA of Am. V. Vullo* (2024) 602 U.S. 175, in which the high court held, "Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." (*Id.* at 180.)

Specifically, allegations that a state official "pressured regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups" sufficiently stated a First Amendment Claim. (*Id.* at 180-181.)

Supreme Court quotes the "government official cannot do indirectly what she is barred from doing directly" language, but ignores the next sentence explaining what this is referring to: "A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." (*Id.* at 190.)

This is because the First Amendment *prohibits* such suppression of speech by the government.

In contrast, banning the sale of a product the majority of citizens find immoral is not prohibited by any law and in fact falls squarely within general police power.

Supreme Court also claims there is a "robust body of precedent" in federal law informing its decision. (R-30), citing the Farms' brief at R-200. However, the Farms discuss only state cases here and misrepresent the holdings of each of these cases, as discussed Point III(A)(2), *infra.*

As for "Final Determination at 11" cited by Supreme Court, the only cases cited there are *National Meat,* discussed at length *supra,* and *Engine Mfrs. Ass'n v.*

S. Coast Air Quality Mgmt. Dist. (2004) 541 U.S. 246, which held that purchase requirements to enforce emission standards were expressly preempted by federal law. The issue was whether sales restrictions and purchase restrictions should be treated differently or the same for purposes of preemption.

"Clearly, Congress contemplated the enforcement of emission standards through purchase requirements." (*Id.* at 254.) This is in stark contrast to the present case, in which Supreme Court admits that not only did the Legislature not contemplate sales bans of agricultural products in passing AML 305-a, but *could not* have done so because such bans are a "relatively recent" development. (R-27, fn6.)

Supreme Court then does exactly what all of the caselaw in this area specifically warns against, which is reading something into the statute that is not there in order to make a finding regarding preemption. Supreme Court states that its decision "must not turn on semantics," but this is *exactly* what the decision *must* turn on, and nothing else. The wording of the statute is what matters, not some unwritten, implied meaning that Supreme Court wishes to find in order to keep with some unstated legislative purpose.

In *Engine Mfrs. Ass'n,* there was very good reason for treating sales and purchase distinctions as equivalent, based on the statute at issue. "In addition to having no basis in the text of the statute, treating sales restrictions and purchase

restrictions differently for pre-emption purposes would make no sense. The manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them." (*Id.* at 254.)

But this does not mean that in other contexts and with other statutes, there is always an equivalence between a regulation of sales and something else.

In its Final Determination, DAM quotes the line, "A command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular emission characteristics is as much an 'attempt to enforce' a 'standard' as a command, accompanied by sanctions, that a certain percentage of a manufacturer's sales volume must consist of such vehicles." (R-108.)

However, the next sentence in *Engine Mfrs. Ass'n.* after the one DAM selectively quoted, which DAM omitted, is, "We decline to read into § 209(a) a purchase/sale distinction **that is not to be found in the text** of § 209(a) **or the structure** of the CAA." (*Engine Mfrs. Ass'n.* At 255, emphasis added.)

Thus, in *Engine Mfrs. Ass'n.*, the high court held it would be improper to infer an exception to a clear express preemption provision in the statute that covered the conduct at issue. In the present case, there is no express preemption of a regulation on retailers outside of an agricultural district, either in the text or structure of AML 305-a, so Respondents are doing exactly what the high court

ruled is improper in *Engine Mfrs. Ass'n*., which is to infer what is not in the text or structure of the statute.

In other words, the result in *Engine Mfrs. Ass'n.* depended on what the statute at issue actually *said*—what Supreme Court here called "semantics" in the order being appealed—not on some general principle that there is no distinction between "purchase" or "sale" in any context. (R-27.) The lesson of *Engine Mfrs. Ass'n.* is that what the statute *actually says* matters in determining if preemption exists, and the courts should not read something else into the statutes.

AML 305-a's prohibition on local laws that "unreasonably restrict or regulate farm operations within agricultural districts" simply does not speak to a local sale ban that does not apply to farms or farm operations and is not in an agricultural district.

Supreme Court seems to be assuming that the Farms have a right to sell products of force feeding in the City, despite no law stating this, and then equates this right to the right of restaurants and retailers to *purchase* foie gras from the Farms, which is also not prohibited by Local Law 202, but will be indirectly affected by it since restaurants and retailers are not then permitted to re-sell the foie gras in the City.

This is much different that the law at issue in *Engine Mfrs.*, in which Congress had expressly preempted purchase and sale requirements for enforcing

emissions standards. The lesson from *Engine Mfrs.* is not that purchase and sale are functionally equivalent in all circumstances, but rather that there must be a statute on point explicitly stating what is preempted. In the present case, there is no statute preempting local sale bans such as Local Law 202, which is not a regulation of farming operations, nor does it apply within any agricultural district.

2. Respondents also misconstrue state caselaw on preemption

The "robust body of precedent" Supreme Court claimed to rely on to support its decision referred to the Farms' brief at R-200, which actually cited state and not federal cases. (R-30.) Respondents misrepresented the holdings of these state cases as well.

In *Lansdown Entertainment Corp. v. New York City Dept. of Consumer Affairs* (1989) 74 N.Y.2d 761, 764, there was a state law explicitly allowing patrons to consume to consume alcoholic beverages on premises until 4:30 a.m., but the City passed a law requiring nightclubs to close at 4:00 a.m. and not allow patrons to remain. Thus, the state law explicitly allowed what the local law forbade.

In contrast, there is no state law explicitly allowing farms to force feed ducks, and certainly no state law requiring New York City to allow the sale of such products of animal cruelty, which the City has determined to be harmful to public health, safety, and morals.

In the next case cited by the Farms, *Planned Consumer Mktg. v. Coats & Clark* (1988) 71 N.Y.2d 442, 448, the Court of Appeals interpreted the application of a federal law with a preemption clause that "has been described as 'virtually unique' in its breadth and scope," and which applies to "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans." (*Ibid,* emphasis in original.)

The Farms cherry pick those three italicized words, "directly or indirectly," and misleadingly claim this refers to some lofty general principle rather than to a specific statute at issue in a particular case. Even in that case with such an expansive preemption provision at issue, the Court of Appeals held that the state law which sought "to inhibit fraudulent conveyances and to protect creditors from debtors' efforts to elude payment…do not purport to relate, directly or indirectly, to employee benefit plans," and therefore is *not* preempted. (*Id.* at 450.)

The final case cited by the Farms at R-200 was *Tucker v. Toia* (1977) 43 N.Y.2d 1, 8. The Farms again selectively quoted a few words from a sentence out of their particular context. The complete language is:

> In view of this legislative history, as well as the mandatory language of the provision itself, it is clear that section 1 of article XVII imposes upon the State an affirmative duty to aid the needy. [Citations]. Although our Constitution provides the Legislature with discretion in determining the means by which this objective is to be effectuated, in determining the amount of aid, and in classifying recipients and

> defining the term "needy", it unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy. Such a definite constitutional mandate cannot be ignored or easily evaded in either its letter or its spirit.

The Farms quote only the last sentence above, taking a state constitutional provision the Court of Appeals held "cannot be ignored or easily evaded in either its letter or its spirit" once the state has already made the determination that certain persons fall within the category of persons protected, and claim this means the City cannot pass local laws that will have indirect economic effects on farms elsewhere.

However, there is no "constitutional mandate" that the City not take any action that could have such indirect economic effects elsewhere.

3. Local Law 202 does not apply to any "farm operations" including sales by farms

DAM's finding that Local Law 202 is intended to indirectly regulate or restrict on-farm operations is belied by the text of Local Law 202 itself, which is limited in application to local restaurants and retailers.

Thus, the Farms' *own* sales within the City are not regulated *at all* by Local Law 202. The Farms can continue to sell to consumers, distributors, and other customers within the City. It is only local restaurants and retailers that are regulated by the law.

If the true unstated purpose of Local Law 202 was to weaponize the population size of the City to indirectly "restrict or regulate" on-farm operations, to

be effective in this regard it would need to be a *complete* ban, not one that applies only to local restaurants and retailers. By allowing the Farms to continue to sell through online and phone orders direct to consumers, as well as to distributors and other businesses located within the City, the text of Local Law 202 demonstrates that it is not intended to—and in fact does not—regulate the Farms.

In an attempt to avoid this logical flaw in its argument, DAM's previous Annulled Final Determination erroneously stated, "Local Law 202's prohibition of the purchase, sale, or distribution of the 'force-fed' products was enacted to restrict HVFG and LBF from accessing and selling its products in the City." (R-91.) This was an incorrect reading of Local Law 202, which does not stop HVFG and LBF from selling any of their products in the City.

VFAR repeatedly raised this issue in its previous amicus filings with Supreme Court in *Ball 1*, and the parties as a result finally had to acknowledge that VFAR's position on this was correct, that Local Law 202 only applies to local *restaurants and retailers*, not to the Farms or other businesses.

Indeed, in its most recent Final Determination, which DAM issued after claiming to have finally reviewed the entire legislative history in compliance with Supreme Court's order reversing DAM's Annulled Final Determination, and which DAM gave the City no further opportunity to respond to, DAM altered the above language to read: "Local Law 202's prohibition of the purchase, sale, or

distribution of the 'force-fed' products *by retail food stores and food service establishments* was enacted to restrict the Farms from accessing and selling its products in the City, which also is subject to AML Section 305-a review." (R-108, emphasis added.)

Thus, DAM finally acknowledged in its most recent Final Determination that Local Law 202 is not a complete "prohibition of the purchase, sale, or distribution of the 'force-fed' products" as DAM had previously erroneously stated in both its Interim Determination and Annulled Final Determination, but rather is intended to regulate local restaurants and retail establishments only. But DAM refused to give the City any opportunity to respond to DAM's corrected reading of the effects of Local Law 202 upon reviewing the legislative history as ordered by Supreme Court, before issuing its most recent Final Determination.

4. Local Law 202 is a valid exercise of general police power to protect general welfare and public morals within the City, not regulate farming operations outside of the City

Supreme Court's decision hinges on Local Law 202 being "intended to protect the welfare of birds, rather than the health or safety of humans." (R-28.)

This ignores the history and purpose of animal cruelty laws, which is to protect people and society from immoral behavior and fall under the general police power to protect public health, safety, morals, and general welfare.

"States may sometimes ban the in-state sale of products they deem unethical

or immoral without regard to where those products are made (for example, goods manufactured with child labor)." (*Nat'l Pork Producers,* 598 U.S. 356, 381.)

Supreme Court implies that such concerns are an improper basis for exercising general police power, stating in a footnote, "it is easy to envision sales bans being based on concerns about other aspects of 'farm operations,' such as the treatment of farm workers or the effect of agricultural practices on the environment." (R-29, fn8.)

Supreme Court also implies that if a municipality were to "ban the sale of eggs produced by caged chickens, or the sale of beef produced by corn-fed cattle," this too would be impermissible under AML 305-a. (R-29.)

Thus, under Supreme Court's reading, the City is powerless to enact a ban on eggs from caged hens, even if most such eggs are produced out of state, because some in-state farms might then not be able to sell their eggs in the City.

The function and purpose of a local ban on the sale of a product voters and their elected representatives deem to have been cruelly produced is to protect moral values in the City, not regulate agriculture outside of it. The Tenth Amendment to the U.S. Constitution reserves general police powers to the states, which Article 9 of the New York State Constitution extends to home rule municipalities.

"Police power is the general inherent power vested in each State to prescribe

such reasonable rules for the conduct of its citizens and residents, and regulations for the use of private property, as are necessary for the welfare of the public and not in conflict with rights secured by the State and United States Constitutions." (*Bronx Chamber of Commerce, Inc. v. Fullen* (Sup.Ct. 1940) 174 Misc. 524, 530.)

"The police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual and spiritual needs may also be considered." (*Barrett v. State* (1917) 220 N.Y. 423, 428.)

"The right of a State in the exercise of the police power to make regulations which indirectly affect interstate commerce has been frequently sustained." (*Field v. Barber Asphalt Paving Co*. (1904) 194 U.S. 618, 623.)

Police power may be lawfully resorted to for the purpose of preserving public health, safety and morals; a large discrimination is necessarily vested in the legislature to determine what the public interests require and what measures are necessary for the protection of such interests. (*Cook v. Marshall County* (1905) 196 U.S. 261, 268.) In the exercise of this power the local jurisdiction has the right, generally, to determine what laws are needed to preserve the public health and protect the public safety. (*People v. Havnor* (1896) 149 N.Y. 195, 200.)

There is a long tradition in the United States of local police power being used to determine that a certain product is immoral and prohibiting the sale or purchase of that product within the local jurisdiction on that basis. That tradition

includes circumstances in which some or all of the conduct that lawmakers find morally objectionable occurs before the product crosses the localities' borders. (*See, e.g.*, *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry* (5th Cir. 2007) 476 F.3d 326, 335 (ban on in-state sale of horse-meat for human consumption, even though slaughter occurs out of state); Ga. Code Ann. § 26-2-160 (same with respect to sale of dog meat); 410 Ill. Comp. Stat. 620/17.2(b) (ban on in-state sale of cosmetics developed using animal testing); N.Y. Gen. Bus. Law § 69-a (prohibition on in-state sale of goods produced "through the use of child labor"); N.J. Rev. Stat. § 23:2A-13.3(a) (ban on in-state sale of "any ivory, ivory product, rhinoceros horn, or rhinoceros horn product"); *cf.* 19 U.S.C. § 3903 (restriction on trade in conflict diamonds).

Like Local Law 202, such statutes are based on "distaste" for or "disgust" with the prohibited product. (*Cavel Int'l, Inc. v. Madigan* (7th Cir. 2007) 500 F.3d 551, 557.) And their legitimacy is not undermined if the prohibited product was once permissible or remains in favor in other regions. (*See, e.g.*, *Cavel*, 500 F.3d at 552 ("[h]orse meat was until recently an accepted part of the American diet" and remains "a delicacy" in some countries).

Animal cruelty statutes like Local Law 202 derive from general police power over health, safety, and welfare to protect *people* from being exposed to immoral behavior. Thus, animal cruelty laws are "directed against acts which may

be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts." (*Collins v. Tri-State Zoological Park of W. Md., Inc*. (D.Md. 2021) 514 F. Supp. 3d 773, 781, citing *Commonwealth v. Higgins* (1931) 277 Mass. 191, 194.)

"A legislative proscription, such as that found in the cruelty to animals statute, is declarative of public policy and is tantamount to calling the proscribed matter prejudicial to the interests of the public." (*Pa. Soc. For Prevention of Cruelty to Animals v. Bravo Enterprises, Inc*. (1968) 428 Pa. 350, 237.) "When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public." (*Pennsylvania Public Utility Com. V. Israel* (1947) 356 Pa. 400, 1947 Pa. LEXIS 355, ***6.)

Local voters do not wish to be exposed, or have the people of their City exposed, to the sale of products of animal suffering that could corrupt public morals and dull humanitarian feelings. This is a legitimate exercise of general police power.

While on the one hand claiming that residents of the City and their elected representatives are not permitted to be concerned with how a product *sold in the City* is produced, Respondents at the same time seek to refute the City's position that force feeding birds to grossly enlarge the birds' livers is cruel, and hence the sale and profiting from the sale of such products is immoral. However, whether

sale of a particular product is immoral is a local value judgment, and voters and their representatives are entitled to "ensure that retailers comply with local laws and norms." (*Tenn. Wine & Spirits Retailers Ass'n v. Thomas* (2019) 139 S.Ct. 2449, 2477.)

Supreme Court also repeatedly refers to Local Law 202 as being "unreasonable," but this is based on Supreme Court's misapprehension of the purpose of such laws as being to stop animal cruelty somewhere else, rather than to protect people in the City from being exposed to the sale of products of such cruelty.

"[A] condition may be imposed upon property so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property." (*Matter of Greencove Assoc., LLC v. Town Bd. Of the Town of N. Hempstead* (2011) 87 A.D.3d 1066, 1068.)

Here, Local Law 202 rectifies exactly the problem identified, which is the disgust and moral revulsion people in the City are made to feel when force-fed products are advertised and sold at restaurants and retailers. (R-3124, ¶58; R-3168-3175, ¶¶172-177; R-3788-4627.)

In 2023, the high court upheld the constitutionality of California's Proposition 12, banning the sale of whole pork products from pigs who had been confined their entire lives in cages too small to move or turn around, regardless of

where the farms were located, against a dormant Commerce Clause challenge brought by the National Pork Producers Council based on extraterritorial economic effects of the law. The high court held, "States may sometimes ban the in-state sale of products they deem unethical or immoral without regard to where those products are made (for example, goods manufactured with child labor)." (*Nat'l Pork Producers,* 598 U.S. 356, 381.) Such laws fall under general police powers to "promote…public morals." (*Ibid,* quoting *Western Union Tel. Co. v. James* (1896) 162 U.S. 650, 653, ellipses in original.) "And , at least arguably, Proposition 12 works in just this way—banning from the State all whole pork products derived from practices its voters consider 'cruel.'" (*Ibid.*)

DAM's sweeping order here does much more than protect the economic interests of two farms indirectly effected. Under DAM's order, the City is prohibited from enforcing its ban on force-fed products no matter where they are produced, whether in state or out of state. Many foie gras products come from Canada, and a Canadian company was the lead plaintiff in the case challenging California's ban. (*Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Becerra* (2017) 870 F.3d 1140.)

Under Respondents' and Supreme Court's logic here, Local Law 202 is also an attempt by the City to "regulate" the activities of the foie gras farms just over the border in Canada that also supply foie gras to restaurants in the United States,

including New York City. But the high court has soundly rejected such a theory in ruling that California's ban on pork from pigs kept in cages too small to move or turn around in another state is not an attempt to "regulate" activities in those states, even if those farms would have to restructure operations to sell in California. (*Nat'l Pork Producers,* 598 U.S. 356, 391.)

Local Law 202 applies to all force-fed products no matter where they are produced, and indirect economic effects on two farms in the state cannot be a valid basis under AML 305-a for depriving the City of its home rule authority to ban the sale of such products, even those that are produced in Canada.

5. Respondents misquote a councilmember to infer an unstated purpose

DAM's Interim Determination, which it purports to rely on for its Second Final Determination despite the Court ordering it to conduct "further proceedings" on the Farms' AML 305-a applications, also selectively quotes Councilman Mark Levine as stating, "Now, several of these bills, I want to acknowledge, will have an impact on business..." (R-73.)

Councilman Levine was referring here to a *package* of bills, including a ban on retail sale of dogs, cats, and rabbits in pet stores, as well as a "Meatless Mondays" resolution for school lunch menus, as is clear in the full transcript Respondents selectively quote from. (R-3478-3480.) Those other laws Levine was referring to are likely to have a much greater impact on agriculture in some form or

another than regulating the 1.5% of restaurants in the City selling luxury foie gras products. (R-3136, ¶19.) Yet Respondents have only targeted Local Law 202 as supposedly violating AML 305-a, and then conflated statements about these other laws considered at the same Committee on Health hearing as supporting this argument.

In its Second Final Determination, DAM goes further and deliberately misquotes Levine, switching the word "businesses" with "farms," stating in point number 13, "The Chair of the City Council's Committee on Health, when introducing this bill for a Committee vote recognized Local Law 202's prohibition of sales of force-fed animal products in the City would have an economic impact ***on farms*** continuing to use that feeding method, and further commented that Local Law 202, along with the other animal welfare bills on which a committee would be voting 'for the animals in the city and beyond.'" (R-3502, par. 13, emphasis added.)

As noted above, Levine never said "on farms," but rather said "**<u>several</u>** of these bills, I want to acknowledge, will have an impact on **<u>business</u>**." (R-3480, emphasis added.)

By replacing "business" with "farms" in its Second Final Determination, DAM demonstrates that it will change words and facts to support its agenda and misrepresent the purpose of Local Law 202. DAM also omitted the fact that Levine

was referring to "several" bills, not specifically to Local Law 202.

There is no reason DAM would need to deliberately misquote Levine in this manner, except to manufacture support for its baseless contention regarding there being a secret, nefarious purpose behind Local Law 202, support for which is found nowhere in the legislative record DAM has now purportedly fully reviewed in compliance with the Court's order in *Ball 1*.

DAM also selectively quotes Levine's "for the animals in the city and beyond" statement as referring to the "impact on farms" language he never used, and again without acknowledging that Levine was referring to a package of bills of Local Law 202 was only one.

In introducing this bill package, Levine referred to bills that certainly would have an impact for animals outside of the City, having nothing to do with agriculture and not implicating any jurisdictional issues. For instance, "a tax credit for the adoption of household pets," which will likely cause more animals to be adopted from shelters or rescues, including from shelters outside of the City, by people in the City obtaining a tax credit, and thus is likely to have a positive impact "for the animals in the city and beyond." (R-3480.)

Even more directly tied to this language was a resolution Levine referred to "calling on the federal government to pass the so-called Pact Act, making animal abuse illegal at the federal level." (*Ibid.*) Clearly a resolution calling on the federal

government to pass a federal animal cruelty law is intended to have an impact "for the animals in the city and beyond," and it is not outside of the City's purview to make such a recommendation to the federal government.

For DAM to misrepresent Councilmember Levine's statement as referring to Local Law 202, when a package of bills were being considered, some of which unquestionably would have direct, intended, and entirely appropriate effects outside of the City without actually regulating anything outside of the City, again shows DAM's true agenda, which is to misrepresent the record leading to the passage of Local Law 202.

If there were any evidence in the record of the true purpose of Local Law 202 being to "unreasonably restrict or regulate" *farms* outside the City, DAM would not need to misquote and misrepresent the record in this manner and claim bill supporters and sponsors said things the record shows they did not say, or that they said about something else entirely and not in relation to Local Law 202.

DAM asserted in its Annulled Final Determination without any factual support, "Further, the City's intent and purpose of the ban is to induce the abandonment of the traditional feeding practice used by HVFG and LBF by denying the farms access to their principal market." (R-3489.) Yet, there is no statement anywhere in the record showing the City intended Local Law 202 to do anything other than regulate what *local* restaurants and retailers could sell. In fact,

by leaving the market entirely open to HVFG and LBF to continue online sales or other direct sales to consumers and distributors, it is clear the City was not using Local Law 202 as some sort of an economic weapon as claimed by Respondents.

DAM omitted this language from its Second Final Determination and instead replaced it with the misquotes of Councilmember Levine referenced above, apparently attempting to fill this gap in what DAM claimed was part of the record but is not.

6. Respondents misrepresent the City's response to the Interim Determination

DAM also erroneously claimed in its Annulled Final Determination that the City asserted in its November 2020 Response to DAM's Interim Determination, "the City has the authority to enact a law designed to change on-farm animal husbandry practices by farms beyond its borders, and within agricultural districts, by closing its markets to a lawfully produced product." (R-3489.) Yet, nowhere in the City's Response or anywhere else in the record did the City state any such position.

In DAM's Second Final Determination, it altered the above language to instead state that the City in its November 2020 Response "contended that the prohibition of the sale and distribution by City businesses of food products, produced using an on-farm feeding practice found by the City to be cruel and

inhumane, was a legitimate exercise of the City's home rule powers." (R-3499.)

Thus, DAM removed the "change on-farm animal husbandry practices by farms beyond its borders" and "closing its markets to a lawfully produced product" language of the Annulled Final Determination and replaced it in its Second Final Determination with the language, "prohibition of the sale and distribution by City businesses of food products, produced using an on-farm feeding practice found by the City to be cruel and inhumane." (*Ibid.*)

This change was not based on further review of the legislative history as ordered by Supreme Court, but rather on the plain language of Local Law 202 itself, which DAM misstated in its Interim Determination and Annulled Final Determination. Yet, DAM gave the City no opportunity to respond to this new contention stated for the first time in its Second Final Determination.

DAM also erroneously claimed in its Annulled Final Determination that the "City did not contest the Department's findings in its August 4th [2020] letter that: (1) the feeding practices of HVFG and LBF are customary agricultural practices; (2) there are currently no commercially viable alternatives to handfeeding to produce foie gras; (3) HVFG and LBF are in compliance with the laws of New York State; and (4) there are no federal or State prohibitions on the production or sale of the farm products produced by HVFG or LBF due to their feeding practices." (R-3489.)

However, the "feeding practices" DAM referred to here was "handfeeding." (*Ibid.*) Local Law 202 does not prohibit the sale of products of "handfeeding." Local Law 202 prohibits products of *force* feeding. Force feeding is clearly not a customary farming practice, as only two farms in the entire United States engage in this extreme and unusual practice, which dozens of countries have banned. (R-3164, ¶164.)

The Second Final Determination similarly does not make any finding that HVFG or LBF are engaged force feeding, instead again claiming they use a "handfeeding gavage method." (R-3501, item 8.)

The reason Respondents need to misrepresent the facts and the record in the manner described above is there is no state law preempting a local law banning the sale of a particular product that a municipality deems to have been cruelly produced, so Respondents need to fashion Local Law 202 as a direct attempt to control agriculture.

B. Local Law 202 Also Protects Public Health

Only if (1) DAM has jurisdiction to review local laws outside of agricultural districts, and (2) AML 305-a applies to Local Law 202 as a law that "restrict[s] or regulate[s] farm operations within agricultural districts," does the burden then shift to the City to show a public health or safety justification for Local Law 202. (AML 305-a.)

In addition to DAM ignoring all of the evidence in the record about the purpose of Local Law 202 being to protect residents of the City from being exposed to sales of a product the voters deem to be cruel, and instead manufacturing out of whole cloth what DAM contends is the secret, nefarious purpose of the law being to "unreasonably restrict or regulate farm operations within agricultural districts," DAM also ignored evidence in the record regarding the public health and/or safety concerns supporting Local Law 202.

The Interim Determination had erroneously stated, "Nothing in the legislative record indicates that it was intended to address a public health or safety concern." (R-74.)

Now that DAM claims to have finally reviewed the legislative record in compliance with Supreme Court's order in *Ball 1*, it should have issued a new Interim Determination if it still found there to be a violation of AML 305-a, and allowed the City to respond accordingly.

Yet, DAM has ignored the evidence in the record regarding Local Law 202 addressing a public health or safety concern. (R-3133-3134, ¶8.) Moreover, local jurisdictions "may often adopt laws addressing even 'imperfectly understood' health risks associated with goods sold within their borders." (*Ross,* 598 U.S. 356, 381.) Thus, it is up to the City, and not DAM, to decide whether such health risks identified in the record provide a sufficient justification for Local Law 202.

C. DAM's factual findings are not supported by the record

DAM's Second Final Determination also lists a number of findings DAM claims it made in its Interim Determination, which DAM also claims are now "uncontested," despite either being directly contradicted by the record or finding no support in the record. Such claims include:

a. "AML Article 25-AA provides that agricultural uses as part of a farm operation and on-farm agricultural practices should be free from unreasonable local restriction when a farm operation is located within an agricultural district." (R-3501, item 3.)

This finding is affected by errors of law, because DAM is expanding the meaning of "local restriction" to now refer to a restriction imposed 100 miles away in a different jurisdiction on businesses that are not in an agricultural district.

b. "The ability of farms to market their product ***throughout the State*** supports and promotes the viability of farm operations and preserves the land base." (R-3501, item 5, emphasis added.)

This finding is unsupported by facts in the record. The Interim Determination states, "The ability of farm operations to market crops, livestock and livestock products supports and promotes the viability of farm operations, as well as, preserves the land base." (R-72.) The language "throughout the State" does not appear, and the City was never given an opportunity to respond to this

contention.

Furthermore, AML 305-a does not preempt local sale bans outside of agricultural districts. A separate law under Article 5-D enacted in 1970 did preempt such local laws but has long since been repealed. Specifically, AML 96-z-29 originally provided as follows:

> All poultry and poultry products bearing an official inspection legend affixed after a state inspection or federal inspection may be sold, exposed for sale, exchanged or transported at all places within the state.

AML 96-z-29 was repealed in 1982. Accordingly, there is no state law requiring municipalities to allow the sale of any poultry products.

c. "HVFG and LBF use the gavage method of feeding for male ducks used to produce foie gras, a customary agricultural practice."

This finding is unsupported by facts in the record because DAM uses the euphemism "gavage," a French word, to refer to the act of force feeding, which is far from "customary." In fact HVFG and LBF are the only two farms in the United States that engage in this controversial act which has been banned by dozens of countries. Additionally, this finding is affected by errors of law, because what is "customary" in one region may not be so in another, and the City has home rule authority to determine what products are allowed to be sold in the City. ("[O]ur constitutional order…allows 'different communities' to live 'with different local standards,' *Sable Communications of Cal., Inc. v. FCC*, 492 U. S. 115, 126, 109 S.

Ct. 2829, 106 L. Ed. 2d 93 (1989)." (*Nat'l Pork Producers*, 598 U.S. 356, 375.)

d. "There are currently no commercially viable alternatives to the handfeeding gavage method used by the Farms to produce foie gras."

This finding is not supported by facts in the record. By referring to a different feeding method—"handfeeding"—than the feeding method at issue here, DAM deliberately confuses the issues and what facts it expected the City to respond to. Force feeding is not "handfeeding."

Even if DAM had used the relevant term here and referred to the feeding method that Local Law 202 refers to, this finding would be affected by errors of law because nothing in AML 305-a requires the City to participate in a market for products that the voters through their elected representatives have deemed to be cruel.

e. "Were Local Law 202 to go into effect, it would result in a significant loss of sales for the Farms and local community – HVFG estimates a loss of approximately $7 million dollars in sales and a reduction of 20-25% of its 280-person workforce; and LBF estimates a loss of approximately $3 million dollar loss of sales and a reduction of most of its 100 employees."

This finding is not supported by facts in the record. The information submitted by HVFG and LBF show that padded into these gross figures are sales

of *all* of their products unaffected by Local Law 202, including duck legs and breasts, as well as foie gras sold to distributors that in turn market and sell foie gras to customers *outside* of the City. Thus, DAM has vastly inflated the economic impact of Local law 202.

f. "The Chair of the City Council's Committee on Health, when introducing this bill for a Committee vote recognized Local Law 202's prohibition of sales of force-fed animal products in the City would have an economic impact on farms continuing to use that feeding method, and further commented that Local Law 202, along with the other animal welfare bills on which a committee would be voting 'for the animals in the city and beyond.'"

This finding is not supported by facts in the record. As explained in Point III(A)(5), *supra,* Levine said the package of bills would have an impact on "***business***," not "farms," and the reference to helping animals "in the city and beyond" was a reference to bills included in the package that for instance called on the federal government to make animal cruelty a federal crime.

CONCLUSION

For the foregoing reasons, Supreme Court's decision should be reversed and both petitions granted. DAM's order that the City not enforce Local Law 202 should be annulled as lacking jurisdiction, ultra vires, and an abuse of discretion.

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Respectfully submitted,

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