THE LOWEST COMMON DENOMINATOR: NATIONAL UNIFORMITY FOR FOOD ACT

"Protecting citizens from unsafe foods is a quintessential governmental function."\footnote{1}

I. INTRODUCTION

Until this past century, the regulation of domestic food in the United States ("U.S."’) has traditionally been performed by individual states.\footnote{2} The growth of interstate commerce and scandals in the meat industry\footnote{3} and patent medicine industry\footnote{4} led to federal intercession in 1906.\footnote{5} Over the next eighty years, federal regulations broadened in both scope and depth. They included regulations regarding not only food adulteration and misbranding,\footnote{6} but also food and color additives,\footnote{7} pesticide residue,\footnote{8} and quantity labeling.\footnote{9} There were a particularly large number of federal consumer protection laws\footnote{9} enacted during the "Consumer Decade,"\footnote{10} between the mid-1960s through the mid-1970s.\footnote{11}
State activism and state actions increased due to a domestic policy of federalism and federal deregulation ushered in during the Reagan era. California's Safe Drinking Water and Toxic Enforcement Act of 1986, Proposition 65, was foremost among these state actions. The Act was broader and more stringent than existing federal regulations. It was designed to "address ... growing concerns about exposure to toxic chemicals" after the federal government's deregulation. Proposition 65 has been under attack by Congressional bills intending to preempt it and other stringent state regulations in favor of uniform but less stringent federal regulations. The latest of these bills is H.R. 4167 / S. 3128, the National Uniformity for Food Act of 2005 / 2006 ("NUFA"). The NUFA and future similar bills threaten to reverse 100 years of established consumer protection under the guise of national uniformity.

This Comment will examine the history of food safety and warning notification regulation in the U.S. over the last 100 years. Discussion will include the enactments of state regulations, focusing on California's Proposition 65. This Comment will examine the history of attempts to preempt state regulations; the changes in food safety and warning notification regulations proposed by the NUFA; and why this bill, and future similar bills, should be defeated as unnecessary and unable to provide the uniformity they purport to seek.
II. A HISTORICAL OVERVIEW OF EXPANDING FOOD REGULATIONS

A. Federal Regulations

The first statutes regulating food began with the individual colonies and concerned bread and meat.\(^{20}\) After American independence from England, the individual states continued to pass and enforce their own various regulations.\(^{21}\) Upton Sinclair’s “The Jungle”\(^ {22}\) was a well-publicized exposé of appalling conditions in the American meat packing industry. It led to public demands for government intercession at the federal level regarding the safety of foods for the American consumer.\(^ {23}\) The Federal Food and Drugs Act of 1906 (“FFDA”)\(^ {24}\) and its companion, the Federal Meat Inspection Act,\(^ {25}\) were the result. The FFDA prohibited “the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors.”\(^ {26}\) Even this relatively weak regulation was opposed; arguments that the Federal government had no business interfering in what had traditionally been regulated by the individual states were prevalent.\(^ {27}\) In 1914, the Supreme Court interpreted these regulations as a means to assure the consumer that what he thought he bought and what he actually bought were the same.\(^ {28}\) The FFDA was superseded by the Federal Food, Drug, and Cosmetic Act (“FFDCA”)\(^ {29}\) in 1938. This takeover was partly due to the vacuum within the FFDA: an absence of food quality regulation and standardized labeling.\(^ {30}\) The FFDCA prohibited the introduction, adulteration or misbranding of any food in interstate commerce.\(^ {31}\) It provided that safe tolerances be set for additives\(^ {32}\) and poisonous substances.\(^ {33}\) The

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\(^{22}\) UPTON SINCLAIR, THE JUNGLE (1906).

\(^{23}\) Young, supra note 20.

\(^{24}\) FFDA, supra note 5.

\(^{25}\) FMIA, supra note 5.

\(^{26}\) FFDA, supra note 5.

\(^{27}\) Janssen, supra note 21.


\(^{29}\) FFDCA, supra note 6, § 301 et seq.


\(^{31}\) FFDCA, supra note 6, § 331(a)-(b).

\(^{32}\) Id. § 348(a).
FFDCA also prohibited the factories from refusing inspections\textsuperscript{34} and added injunctions as enforcement tools\textsuperscript{35} of the renamed the Food and Drug Administration ("FDA").

After six decades of working to ensure the safety of the American consumer's food, the focus of Congressional policy shifted. The focus became assisting consumers and manufacturers in obtaining accurate information of the quantity of the food and the packaging, but still not the quality of the contents.\textsuperscript{36} The concern of the 1966 Fair Packaging and Labeling Act ("FPLA")\textsuperscript{37} was limited only to quantity accuracy and placement of labels for all consumer products in interstate commerce.\textsuperscript{38} The FPLA was intended, "to prevent deception of consumers and allow consumers to facilitate value comparisons."\textsuperscript{39} Products were to be honestly and informatively labeled with the identity of the product; name and place of business of the manufacturer, packer, or distributor; and net quantity of contents.\textsuperscript{40} Though the FPLA sought the greatest practicable uniformity in state and federal labeling regulations, it also sought to not interfere with state programs.\textsuperscript{41} It expressly preempted only less-stringent or different state regulations\textsuperscript{42} dealing only and specifically with packaging labeling of the net quantity of the contents.\textsuperscript{43} The individual States retained the right to require other "supplemental statements"\textsuperscript{44} provided they did not include "any term qualifying . . . the amount of the commodity."\textsuperscript{45}

This focus on labeling continued in 1990 with the Nutrition Labeling Education Act ("NLEA"),\textsuperscript{46} an amendment to the FFDCA. The NLEA required nutrition labeling\textsuperscript{47} for all packaged foods\textsuperscript{48} and preempted state

\textsuperscript{34} Id. § 346.
\textsuperscript{35} Id. § 331(f).
\textsuperscript{36} Id. § 332.
\textsuperscript{37} FPLA, supra note 9, § 1451.
\textsuperscript{38} Id. §§ 1451-61.
\textsuperscript{39} Id. § 1453.
\textsuperscript{40} Id. § 1454(c).
\textsuperscript{41} Id. § 1453(a)(1)-(2).
\textsuperscript{42} Id. § 1458.
\textsuperscript{43} Id. § 1461.
\textsuperscript{44} Id.
\textsuperscript{45} Id. § 1453(b).
\textsuperscript{47} Id. § 2(a) (adding FFDCA § 403(q)).
requirements regarding food standards, nutrition labeling, and health claims. 49 Like the FPLA, the NLEA did not include regulations for food label warning notifications. 50 Opposition at the Federal level now uses the U.S. Constitution’s Supremacy Clause 51 as a means to preempt state food warning regulations with the less-stringent federal regulations, such as the proposed National Uniformity for Food Act for 2006. 52 Some critics believe the NUFA would result in a less-protected food supply for American consumers. 53

B. The Rise Of State Food And Warning Regulations

Since the formation of the U.S., the individual states traditionally have held primary responsibility for food safety regulations 54 by passing their own laws. 55 Interstate commerce and the need to protect the public from food dangers and fraud required federal input and control. 56 During the 1980s, President Reagan’s New Federalism had the philosophy of restoring local control to local units of government. 57 This led to a return of regulatory authority at the local level. 58 During this time, there were no major federal regulations regarding food safety. 59 This encouraged consumer activism at the state level, 60 which the federal government allowed despite the risks of non-uniform state actions. 61

49 Id.
50 JAMES T. O’REILLY, FOOD AND DRUG ADMINISTRATION, SECOND EDITION, FDA2D §25:4 (June 2006) (Congress declined to preempt state food label warning requirements). See also Gatti, supra note 13, at 750.
51 U.S. CONST. art. VI, cl. 2 (Supremacy Clause) (“This Constitution, and the laws of the United States which shall be made in Pursuance thereof ... under the authority of the United States, shall be Supreme Law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding.”).
52 NUFA, supra note 19.
55 Janssen, supra note 21.
56 O’Reilly, supra note 50, §25:1.
57 C. Boyden Gray, Regulation and Federalism, 1 YALE J. ON REG. 93, 94 (Fall, 1983).
58 Id.
59 Milestones, supra note 48.
60 Gatti, supra note 13, at 739-740.
61 Gray, supra note 57 at 94.
The threat of hazardous substances to human life became a greater concern, and public fears about toxic dangers increased due to a California study of the pesticide toxicity. Environmentalists took advantage of these concerns and drafted California's Proposition 65. Proposition 65 was a ballot initiative that California voters passed in November 1986 by a sixty-three percent majority. It is the first and only such law in the U.S. Proposition 65 requires that manufacturers give a "clear and reasonable warning" notification before knowingly and intentionally exposing a person to a significant risk of any chemical known by the state to cause cancer or reproductive harm. "No significant risk" requires that exposure to the toxic substance will have no observable effect at one thousand times the level in question. This is contrasted with the FFDCA's tolerance: a yearly exposure that is no more than ten times what is considered safe, no harm from aggregate exposure, or a lifetime risk no more than twice what is considered safe. This is exactly why Proposition 65 was enacted: the question is what amount of pesticide chemical residue is considered acceptable, the more stringent California level or the less stringent federal level? Critics charge it is the preemption of this and other state laws that proponents of the NUFA desire, seen by their focusing on preempting Proposition 65, not national uniformity in labeling as they maintain.

California is not the only state enacting regulations to protect its citizens. Attorneys General from thirty-seven states as well as the Asso-

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63 Id.
64 Id.
66 See OEHHA, supra note 62.
68 Id. § 25249.10(c).
69 FFDCA, supra note 6, § 346a(b)(2)(B)(iv).
70 Hearing, supra note 1 (testimony of Peter Barton Hutt, Senior Counsel at Covington and Burling, a Washington DC law firm, and former chief counsel for the FDA).
71 Cal Dooley, Uniformity for Food Act Should be Passed, FRESNO BEE, at B9.
72 CONGRESSIONAL BUDGET OFFICE, CONGRESSIONAL BUDGET OFFICE COST ESTIMATE H.R. 4167, 3 (February 27, 2006), available at http://www.cbo.gov/ftpdocs/70xx/doc7050/hr4167.pdf [hereinafter "CBO"] ("CBO as-
ciation of Food and Drug Officials are voicing their objections to the NUFA’s preempting of their own states’ regulations. Despite these numerous, multi-state regulations, California’s Proposition 65 appears to be a primary target of federal preemption. Even the NUFA’s proponents, publicly stating that the NUFA would preempt only a limited number of states’ laws, agree that Proposition 65 would be completely preempted.

III. ATTEMPTED PREEMPTIONS OF STATE FOOD AND WARNING REGULATIONS

A. Prior Attempts

The battle to diffuse or defeat Proposition 65 began at the federal level soon after its 1986 enactment. Trade associations arranged for the Commissioner of the FDA to testify that FDA regulations were more stringent than Proposition 65 required. Two years after Proposition 65 was enacted, an Executive Office Working Group issued a report in

\[\text{(emphasis added); compare with CENTER FOR SCIENCE IN THE PUBLIC INTEREST, SHREDDING THE FOOD SAFETY NET I-xvii (March 2006), available at http://www.cspinet.org/new/pdf/shredding.pdf (listing the states' laws referenced by the CBO); contra JOHN BODE & STUART PAPE, NATIONAL UNIFORMITY FOR FOOD COALITION, ANALYSIS OF STATE LAWS CITED IN CSPI REPORT “SHREDDING THE FOOD SAFETY NET” (April 24, 2006) available at http://www.uniformityforfood.org/StateLawAnalysisSummaryDetails.pdf (NUFA proponents listing eleven state laws from nine states would be affected by NUFA--this is more than “only” a single state’s laws).}\]

\[\text{73 Letter from National Association of Attorneys General to members of Congress (Mar. 1, 2006), available at http://www.net.org/health/AG%20Letter-FoodSafety-3-1-06.pdf.}\]

\[\text{74 Letter from Association of Food and Drug Officials to Congressional Representatives (Jan. 16, 2006), available at http://www.afdo.org/afdo/upload/AFDO%20HR%2041%20Letter%20to%20Congress%201-16-06.pdf.}\]

\[\text{75 NATIONAL UNIFORMITY FOR FOOD COALITION, “WHAT S. 3128 WILL REALLY ELIMINATE . . .” (Apr. 24, 2006), available at http://www.uniformityforfood.org/RealProp65Costs.pdf (chart showing the coalition’s primary concerns are related to California’s Proposition 65). See also Hearing, supra note 1 (testimony of Peter Barton Hutt).}\]

\[\text{76 BODE & PAPE, supra note 72.}\]


\[\text{78 Id.}\]

\[\text{79 Id.}\]
1988. This report evaluated claims by representatives from trade associations, companies, and the Environmental Defense Fund. The Working Group assumed that food producers would prefer to continue selling their goods in California, despite the costs of reformulating or relabeling, as would be required by Proposition 65. However, the Working Group noted that the quality control improvements required by Proposition 65 should be minimal, provided the products met federal standards, so little relabeling would be required. Also, regardless of relabeling costs, they believed that these costs were more likely to be borne by California consumers through higher priced products. The Working Group concluded that if the costs of this statute became unduly burdensome on producers, the ability to preempt Proposition 65 was required. In 1988, opponents of Proposition 65 appealed to various government officials, including White House counsel. This counsel, S. Jay Plager, made clear there would be no preemptive action and continued appeals would be considered undermining, and potentially embarrassing the Administration. Thus, strategically, opponents of Proposition 65 sought to amend the FFDCA, expressly prohibiting conflicting or inconsistent state laws regarding food safety and warning notifications. With such a clear amendment, no court in the U.S. could misinterpret Congressional intent. Proposition 65 would then be preempted per the U.S. Constitution’s Supremacy Clause.

81 Id. at 2.
82 Id. at 3-4 (the choice for re-labeling was to either label all products to comply with California law or re-label and segregate only those products to be sold in California).
83 Id. at 4, 7.
84 Id. at 7.
85 Id. at 9.
86 Id. at 6; and Id. at Exhibit D: Letter from S. Jay Plager, Admin. Office of Info. Regulatory Affairs to Dr. Frank Young, Comm’r Food & Drug Admin. (May 17, 1989).
87 Id. at Exhibit D: Letter from S. Jay Plager, Admin. Office of Info. Regulatory Affairs to Dr. Frank Young, Comm’r Food & Drug Admin. (May 17, 1989).
88 English v. General Electric Company 496 U.S. 72, 78-79 (1990) ("... state law is pre-empted under the Supremacy Clause U.S. Constitution, art. VI, cl. 2, in three circumstances: First, Congress can define explicitly the extent to which its enactments pre-empt state law. . . . Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. . . . Finally, state law is pre-empted to the extent that it actually conflicts with federal law.").
The focus of the battle turned to Congress and a succession of bills was introduced beginning in 1989. Each bill sought to amend the FFDCA to preempt Proposition 65 and similar states' laws. Each bill included words effectively saying that no state or local government could establish or continue any food safety, warning notification, or pesticide tolerance, which was not identical to that issued by the FDA. None of these bills passed. Three bills were enacted during this period: 1990's Nutrition Labeling and Education Act, preempting state requirements regarding food identity and nutrition but not preem­pting state requirements regarding foods containing poisonous or deleterious substances. The Food Quality Protection Act of 1996, specifically rejected preemption of state requirements regarding warning statements for foods containing pesticide chemical residue. Finally, the Food and Drug Administration Modernization Act of 1997, preempting state requirements regarding nonprescription drugs, but specifically not preempting state requirements adopted by public initiative enacted prior
to September 1, 1997, effectively excluding 1986's Proposition 65 from preemption.\textsuperscript{99}

B. The National Uniformity For Food Act For 2006

Representative Mike Rogers of Michigan\textsuperscript{100} sponsored the National Uniformity for Food Act for 2005, H.R. 4167\textsuperscript{101} to the House of Representatives on October 27, 2005.\textsuperscript{102} It was passed by the House and introduced in the Senate on May 25, 2006\textsuperscript{103} as the National Uniformity for Food Act of 2006, S. 3128.\textsuperscript{104} Sponsored by Senator Richard Burr of North Carolina,\textsuperscript{105} it was referred to the Senate's Committee on Health, Education, Labor, and Pensions, which held a hearing regarding it on July 27, 2006.\textsuperscript{106} The bill never left committee when Congress adjourned. Based on recent history, it is likely a "new" version will be introduced in the next Congress.

1. Preempts State Laws

The NUFA proposes amending 1938's FFDCA “to provide for uniform safety warning notification requirements, and for other purposes.”\textsuperscript{107} The NUFA will accomplish this by expanding the federal government’s preemption of state laws. It will expressly prohibit any state or local government from establishing or continuing, for any food in interstate commerce, all state and local food safety regulations that are not identical to those within this Act,\textsuperscript{108} unless specifically excepted per this Act.\textsuperscript{109}

\textsuperscript{99} [d. See also O’REILLY, supra note 50 §25:5.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} NUFA, supra note 19.
\textsuperscript{104} Id.
\textsuperscript{105} Id. (while a member of the House of Representatives, Mr. Burr also sponsored or cosponsored H.R. 3200 in 1996, H.R. 4383 in 1998, H.R. 2129 in 1999, H.R. 2649 in 2001, and H.R. 2699 in 2004. Each of these bills would preempt state food safety warnings and notification requirements).
\textsuperscript{106} Hearing, supra note 1.
\textsuperscript{107} NUFA, supra note 19.
\textsuperscript{108} Id. at § 2(b)(2) (amending FFDCA by adding § 403B(a)(1): “... no State ... may, directly or indirectly, establish or continue ... any notification requirement ... unless such ... has been prescribed under the authority of this Act ... ”).
State requirements preempted would include all foods that are injurious to health, or unsafe as defined by the FFDCA. Unsafe foods are those: that contain, unless unavoidable or not added to the food, poisonous or deleterious substances that are injurious to health;\textsuperscript{10} that have added poisonous or deleterious substances that are unsafe per the FFDCA’s section 406;\textsuperscript{11} that contain any pesticide chemical residue that is unsafe per the FFDCA’s section 408(a);\textsuperscript{12} that contain any food additive that is unsafe per the FFDCA’s section 409;\textsuperscript{13} that contain any color additives unsafe per FFDCA’s section 721(a);\textsuperscript{14} whose containers have poisonous or deleterious substances that are injurious to health;\textsuperscript{15} and those that have been radiated, unless radiation was to conform to the FFDCA’s section 409.\textsuperscript{16} The NUFA would “allow” the states to enforce only those state requirements which are identical to the FFDCA provisions.\textsuperscript{17} The non-identical state requirements will be preempted even if there is no existing federal regulation relating to the requirement,\textsuperscript{18} or if the Secretary rejects a proposed regulation from a state’s petition.\textsuperscript{19}

Dr. Elsa Murano,\textsuperscript{20} a NUFA proponent testifying before the Senate committee assured the committee that the NUFA was designed not to impact fundamental Federal or State food safety and warning requirements or enforcement.\textsuperscript{21} Peter Hutt\textsuperscript{22} testified that the NUFA does preempt state requirements where the FDA has an established regulation.\textsuperscript{23}

\textsuperscript{10} Id. (amending FFDCA by adding § 403B(a)(1): “Except as provided in subsections (c) and (d), no State . . . may . . . establish or continue . . . any notification requirement . . . unless such . . . has been prescribed under the authority of this Act . . . .”).

\textsuperscript{11} Id. at § 2(a)(3) (amending FFDCA by adding § 403A(a)(6), referring to § 402(a)(1)).

\textsuperscript{12} Id. (amending FFDCA by adding § 403A(a)(6), referring to § 402(a)(2)(A)).

\textsuperscript{13} Id. (amending FFDCA by adding § 403A(a)(6), referring to § 402(a)(2)(B)).

\textsuperscript{14} Id. (amending FFDCA by adding § 403A(a)(6), referring to § 402(a)(2)(C)(i)).

\textsuperscript{15} Id. (amending FFDCA by adding § 403A(a)(6), referring to § 402(c)).

\textsuperscript{16} Id. (amending FFDCA by adding § 403A(a)(6), referring to § 402(a)(6)).

\textsuperscript{17} Id. at § 2(a)(4) (amending FFDCA by adding § 403A(c)(2), where § 403A(c)(1) states “identical means that the language under the laws of a State . . . is substantially the same language as the comparable provision under this Act and that any differences in language do not result in the imposition of materially different requirements”).

\textsuperscript{18} Id. (amending FFDCA by adding § 403A(c)(3), “If the Secretary has not promulgated a regulation . . . a State may enforce a policy . . . that contains a requirement that is identical to a requirement in a section of Federal law . . . .”).

\textsuperscript{19} Id. (amending FFDCA by adding § 403A(c)(4), “If the Secretary has . . . made a determination not to promulgate such regulation . . . a State . . . may not enforce any requirements in State law that are policies rejected by the Secretary . . . .”).

\textsuperscript{20} Hearing, supra note 1.

\textsuperscript{21} Id. (testimony of Dr. Elsa Murano).

\textsuperscript{22} Id.

\textsuperscript{23} Id. (testimony of Peter Barton Hutt).
William Hubbard,\textsuperscript{124} opposing the NUFA, testified that concern about how much preemption would occur cannot be disregarded,\textsuperscript{125} as evidenced by disputes between the NUFA’s proponents and state officials,\textsuperscript{126} and by the contradictions by those testifying before this committee.\textsuperscript{127} Even the Congressional Budget Office (“CBO”) asserts that the scope of preemption by the NUFA is ambiguous.\textsuperscript{128} The CBO assumes this scope will be determined after enactment, through the number of petitions submitted by the states.\textsuperscript{129} Other national acts for uniformity regarding food allow more stringent state regulations to remain intact, and preemption is limited only to state or local regulations which are less stringent.\textsuperscript{130} The NUFA—past, current, and likely future versions—specifically forbids that, requiring the regulations be identical even if the federal regulations are less stringent.\textsuperscript{131}

Congress specifically exempted acts such as Proposition 65 from a 1996 national uniformity law regarding food safety.\textsuperscript{132} This makes clear that, for at least the last ten years, Congress has refused to preempt Proposition 65 and other states’ more stringent requirements. As the NUFA would clearly express Congressional intent to preempt state requirements, the Supremacy Clause may be directly applied.\textsuperscript{133} This clear federal expression will also result in Proposition 65 being automatically preempted per its own clause.\textsuperscript{134}

\textsuperscript{124} Id.
\textsuperscript{125} Id. (testimony of William K. Hubbard) (commenting on the states’ uncertainty regarding preemption).
\textsuperscript{126} Id. (testimony of William K. Hubbard) (“... the dispute between the food industry and others—whether state Attorneys General, state food safety officials, or the Center for Science in the Public Interest ... about the number of law preempted is a good indicator of that ambiguity.”).
\textsuperscript{127} Id. (testimony of Dr. Elsa Murano), contrast with Hearing, supra note 1 (testimony of Peter Barton Hutt) (one witness stating that NUFA will not impact fundamental state food laws, the other stating that any non-identical state law will be preempted).
\textsuperscript{128} CBO, supra note 72.
\textsuperscript{129} Id.
\textsuperscript{130} FPLA, supra note 9, § 1461.
\textsuperscript{131} NUFA, supra note 19, § 2(b)(2) (amending FFDCA by adding § 403A(a)(6)).
\textsuperscript{132} FQPA, supra note 94, § 405 (amending FFDCA §408(n)(8)).
\textsuperscript{133} English v. General Electric Company, supra note 88 at 78-79 (“... state law is preempted under the Supremacy Clause, U.S. Constitution, art. VI, cl. 2, in three circumstances: First, Congress can define explicitly the extent to which its enactments pre-empt state law. ...”).
\textsuperscript{134} Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE § 25249.10(a) (1986) (Section 25249.6 shall not apply to ... an exposure for which federal law governs warning in a manner that preempts state authority).
The NUFA’s proponents stress that the NUFA’s opponents are overly concerned regarding preemption of state requirements.\(^\text{135}\) They point out that the NUFA allows states the right to petition for an exemption or to make their requirement the national standard.\(^\text{136}\) These proponents gloss over the fact that this process could take as long as two years.\(^\text{137}\) This would occupy the resources of both the federal and state agencies. Though the state requirement would remain in effect during this process,\(^\text{138}\) each state must petition for each specific food or food component.\(^\text{139}\) This is a process potentially very costly for the states, therefore less likely to be financially feasible. Another drawback not often mentioned by the NUFA’s proponents is that, absent the state’s filing of a petition, states may enforce only those regulations whose state law-basis is identical to federal law.\(^\text{140}\) If there is no federal law on that particular requirement, the state laws remain preempted, resulting in the states being unable to protect their own citizens.

Very often, state and even local actions have led the way in protecting the public’s health.\(^\text{141}\) When federal and state regulations concerning the health and safety of its citizens overlap, more stringent state regulations are not always preempted.\(^\text{142}\) For example, California pioneered mobile-

\(^{135}\) \textit{Hearing, supra} note 1 (testimony of Dr. Elsa Murano); and \textit{Hearing, supra} note 1 (testimony of Peter Barton Hutt).

\(^{136}\) NUFA, \textit{supra} note 19, § 2(b)(2) (amending FFDCA by adding § 403B(b)(2)).

\(^{137}\) \textit{Id.} (amending FFDCA by adding § 403B(b)(3)). (If a state files its petition for exemption within 180 days after NUFA’s enactment, §403B (b)(3)(A) allows the Secretary up to 270 days to publish a notice for public comment and up to 180 days for public comment, and §403B (b)(3)(B) allows the Secretary up to 360 days for the Secretary to take final action, totaling up to 810 days (approximately 116 weeks) from petition filing until final action. If a state files its petition for exemption more than 180 days after enactment, §403B (c)(3)(A) allows the Secretary up to 30 days to publish a notice for public comment and §403B (b)(3)(B) allows the Secretary up to 60 days for public comment and up to 120 days for the Secretary to take final action, totaling up to 210 days (approximately 30 weeks) from petition filing until final action.).

\(^{138}\) \textit{Id.} (amending FFDCA by adding § 403B(b)(3)(C)).

\(^{139}\) \textit{Id.} (amending FFDCA by adding § 403B(b)(1)(A)(i)).

\(^{140}\) \textit{Id.} at § 2(a)(4) (amending FFDCA by adding § 403A(c)(3-4)).

\(^{141}\) \textit{CALIFORNIA EPA - AIR RESOURCES BOARD, CALIFORNIA'S AIR QUALITY HISTORY Key Events, http://www.arb.ca.gov/html/brochure/history.htm} (last visited May, 28, 2004) (the first air pollution control program in the nation began at the city level [City of Los Angeles, 1945] and the first pollution control district in the nation was established at the county level [Los Angeles County, 1947]).

\(^{142}\) \textit{COMMITTEE ON STATE PRACTICES IN SETTING MOBILE SOURCE EMISSION STANDARDS, NATIONAL RESEARCH COUNCIL, STATE AND FEDERAL STANDARDS FOR MOBILE SOURCE EMISSIONS} [hereinafter \textit{COMMITTEE}].
source emission standards\textsuperscript{143} in 1964,\textsuperscript{44} requiring minimal control systems for 1966 model cars sold in California.\textsuperscript{142} Federal action authorized a study of air quality in 1963’s Clean Air Act,\textsuperscript{146} but there was no direct regulating of emissions controls until 1965.\textsuperscript{147} A 1967 amendment\textsuperscript{148} preempted all state and local standards,\textsuperscript{149} with one notable exception: California’s regulation was specifically not preempted even though it was more stringent than Federal standards.\textsuperscript{150} A 1990 amendment\textsuperscript{151} allowed other states to adopt California’s standards instead of federal standards.\textsuperscript{152} This created a two-tiered standard for emission control laws in the U.S. States are allowed stronger pollution controls than federal regulations require,\textsuperscript{153} making federal pollutant limits the minimal tolerances. To date, seven states have adopted California’s more stringent emissions controls and more are considering adopting them.\textsuperscript{154} California led the way in pollution control on light-duty vehicles\textsuperscript{155} using a program exceeding federal standards\textsuperscript{156} but generally beneficial.\textsuperscript{157} This is despite the auto industry’s arguments that these requirements were cost prohibi-

\textsuperscript{143} Id.
\textsuperscript{144} OFFICE OF MOBILE SOURCES, ENVIRONMENTAL PROTECTION AGENCY, MILESTONES IN AUTO EMISSIONS CONTROL 1 (EPA 400-F-92-014) (Fact Sheet OMS-12) (August, 1994), available at http://www.epa.gov/otaq/consumer/12-miles.pdf.
\textsuperscript{145} Id.
\textsuperscript{147} CALIFORNIA EPA - AIR RESOURCES BOARD, supra note 146.
\textsuperscript{149} Id. (amended 1963’s Clean Air Act, 42 U.S.C. 1857-1857l, preempting State standards).
\textsuperscript{150} Id. § 208(b) (amended 1963’s Clean Air Act, 42 U.S.C. 1857-1857l, providing the first exemption for California); see also COMMITTEE, supra note 142, at 2.
\textsuperscript{152} Id. § 222(b) (adding § 209(e)(2)(B)(i) to Clean Air Act, 42 U.S.C. 7543; where other States may adopt standards identical to California standards).
\textsuperscript{155} COMMITTEE, supra note 142, at 3.
\textsuperscript{156} Id. at 15.
\textsuperscript{157} Id. at 16.
tive and technically impossible. Not only did California receive an exemption from preemption despite industry arguments, both California and the EPA have since enacted even more stringent requirements. These waivers from federal preemption continue, despite their effects extending beyond a single state's borders. Pre-existing and stronger state laws regarding vehicle emissions have been exempted from federal preemption; California and other states' pre-existing efforts in food safety and warning notification warrant similar exemptions from preemption.

2. The NUFA's Supposed Benefits

a. Uniformity

The NUFA's proponents decry the lack of nationally uniform food safety and warning notification requirements. Such uniformity would likely simplify regulation enforcement in the U.S. and save the food industry money from reformulating their products. At the Senate committee hearing on the NUFA, Mr. Hutt testified that under the NUFA, only those state requirements that were identical could be enforced by the states, and that enforcement must also conform to FDA standards. Proponents believe such uniformity may be achieved through the NUFA. Proponents allege that allowing California's Proposition 65 warnings to be "imposed" on the forty-nine other states have led to consumer confusion and complaints across the nation.

159 Id.
160 Id.
162 Id. (recognition that the decision would "affect not only persons in California but also the manufacturers outside the state who must comply with California's requirements in order to produce motor vehicles for sale in California.").
163 Hearing, supra note 1 (testimony of Dr. Elsa Murano).
165 Hearing, supra note 1.
166 Id. (testimony of Peter Barton Hutt).
167 Id. (testimony of Dr. Elsa Murano).
168 NATIONAL UNIFORMITY FOR FOOD COALITION, supra note 75.
b. Protects The Public Health

Proponents of the NUFA contend that the NUFA “balances the need for a strong national law to assure safe food for all our citizens . . . with the right and duty of each State to protect its citizens from harm.” Cal Dooley, the CEO-elect of the Grocery Manufacturer’s Association, wrote that the NUFA will “strengthen America’s food safety net and raise consumer protection to an even higher level.” Proponents believe federal oversight of these uniform safety standards will maintain consumer confidence about food safety no matter which government level is responsible for the actual inspections.

3. Rebuttal Of Benefits

a. Uniformity As A Practical Matter Already Exists

Many manufacturers are already applying a single warning for the entire country rather than separating those products with Proposition 65 warnings for distribution to California alone. Most manufacturers de-
cided that continuing to sell their goods in California was in their best interests and chose to either reformulate their products or attach the required warnings. In essence, a de facto national uniformity may already be in process through Proposition 65, just not the one desired by the NUFA's proponents.

In addition to the public benefits from manufacturers reducing the toxins for which Proposition 65 was enacted, manufacturers have also benefited despite a general unwillingness to comply. Some manufacturers consider Proposition 65 to be a major step towards "environmental enlightenment." One manufacturer of food supplements, though displeased with having to comply with Proposition 65 requirements, chose to remove non-complying products from distribution in California. Reformulating its remaining line of products resulted in more powerful products it has been able to advertise to its benefit.

National food safety and warning notifications can have a similar structure as the two-tiered standards used for emission control. Federal requirements would be the first-tier minimum warnings, while the optional second tier requires stronger warnings. In this manner, national distributors would likely comply with the stronger warnings, passing any costs onto the consumers in those states, but local distributors would still be able to retain the federal requirements.

b. The NUFA Would Lower State Standards

The FDA regulates foods linked to two-thirds of documented outbreaks of foodborne illnesses. Proposition 65 is a direct response to the federal government essentially abandoning food safety regulation in

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179 Dooley, supra note 71 (“Food companies are forced to reformulate products or put unjustified warnings on products not just in California, but in every state in the Union . . . .”) (emphasis added).
181 GREATEST HERBS ON EARTH, supra note 164.
183 GREATEST HERBS ON EARTH, supra note 164.
184 Id. (reformulation brought compliance with Proposition 65 and resulted in more-concentrated extracts, which are therefore more powerful—and may be advertised as such).
the 1980s.\textsuperscript{186} Federal laws are the minimum standards.\textsuperscript{187} State laws have been used to enhance the FDA's objective in protecting the American public.\textsuperscript{188} States even have power to detain products violating State food regulations that federal inspectors do not have.\textsuperscript{189} Congress specifically limited such federal action to medical devices, excluding food safety.\textsuperscript{190}

4. Other Problems With The NUFA

a. Financial Impracticability Of Implementation

The Congressional Budget Office's ("CBO") Cost Estimate for the NUFA states that, if the NUFA were enacted, as many as 200 state petitions for regulation exemptions are expected to be filed early in the enactment.\textsuperscript{191} Proponents of the NUFA deride this number as an error and gross overestimate made by opponents.\textsuperscript{192} They ignore the fact that the FDA and the states' existing safety and warning requirements were the sources of the information for that determination.\textsuperscript{193} Based on this number, the CBO estimates that the FDA would spend an average of $400,000 per petition during the first five years,\textsuperscript{194} totaling $100 million during this time.\textsuperscript{195} The total budget for the Center for Food Safety and Applied Nutrition ("CFSAN") for 2006 was approximately $179.5 million,\textsuperscript{196} $100 million of which is required for existing salaries.\textsuperscript{197} A large number of these FDA employees would be required to handle petition reviews\textsuperscript{198} due to the time constraint on petition evaluations written into the NUFA.

\textsuperscript{186} O'REILLY, supra note 50, §10:1.
\textsuperscript{187} Id. §25:4.
\textsuperscript{188} Id.
\textsuperscript{189} Id. §25:2.
\textsuperscript{190} Id. §25:2 (by the 1976 Medical Device Amendments to the FFDCA).
\textsuperscript{191} CBO, supra note 72.
\textsuperscript{193} CBO, supra note 72.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{198} E-mail from William K. Hubbard, former Assoc. Comm'r for Policy, FDA, to Wendy Aguilar (Sep. 24, 2006, 21:59:45 EST) (on file with author).
Currently, state and local agencies perform over eighty percent of food safety inspections in the U.S. A likely result of requiring states to enforce national requirements in lieu of their own is that some states are likely to turn over the enforcement of federal requirements to the federal government and re-budget state money elsewhere. Concurrently, the FDA has approximately the same number of inspectors as in the 1970s to handle this expected increased enforcement workload. Without a significant increase in the FDA’s budget, there simply are insufficient funds to implement either the NUFA’s petition process or the likely increase in inspections formerly performed by the States.

The FDA simply cannot implement this bill without large amounts of additional money if it were to now be largely responsible for enforcement of food safety in the U.S.

b. No Guarantee That The NUFA Would Be Science-Based

Proponents claim that the NUFA would provide “science-based” regulation, as opposed to Proposition 65 and other state regulations. One of the reasons for Proposition 65’s enactment was there were no federal regulations for over one-third of the carcinogenic chemicals already recognized by National Toxicology Program testing. Proposition 65 supporters wanted science-based regulation and determined four methods for a chemical to be listed: 1) those already identified as toxic by national or international toxicology and cancer research organizations; 2) those listed by authoritative regulatory agency and scientific organizations; 3) those nominated by the state’s experts; and 4) those already

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199 Letter from National Association of Attorneys General to members of Congress (March 1, 2006), available at http://www.net.org/health/AG%20Letter-FoodSafety-3-1-06.pdf. See also Letter from J. Carlton Courter III, President of the Nat’l Ass’n of State Dep’ts of Agric. to members of the U.S. Senate Health, Education, Labor & Pensions Committee (October 17, 2005), available at http://www2.nasda.org/exeres/64195D1F-4A1D-4959-9D0A-DE0EE4CB099F.htm?NRORIGINAL.

200 Hearing, supra note 1 (testimony of William K. Hubbard).

201 Id. (testimony of Senator Saxby Chambliss), and Id. (testimony of Dr. Elsa Murano).


203 Id.

204 Id.

205 Id.

206 Id.

207 Id.
regulated. Though the listing was based on sufficiency of scientific evidence, this was not a perfect system. California's governor was accused of pandering to special interests by restricting the list of chemicals, against the advice of California's own Department of Health Services.

The NUFA's proponents deride Proposition 65 as not being science-based. However, the FDA cannot guarantee it would use science-based research in determining food safety and warning notification requirements. A former commissioner of food and drugs was questioned by Congress regarding the amount of science versus financial or political influence in his decision-making. "This commissioner refused to comment and his attorney indicated he would plead the Fifth Amendment in court. When the FDA opens itself to accusations from consumer groups and Congress — and even their own scientists — for putting politics ahead of scientific research, it seems that the NUFA's proponents cannot ensure that the FDA would itself use science-based regulations.

IV. CONCLUSION

The NUFA should not be enacted into law as it unnecessarily preempts stronger state, and even city, laws in favor of a weaker federal law. National uniformity in labeling is already in progress through California's Proposition 65. This makes the NUFA unnecessary, particularly if a two-tiered system is implemented for food safety and warning require-
ments similar to emission control requirements. The NUFA is also financially impracticable to implement due to costs and its own time constraints. Finally, there is no guarantee that the NUFA requirements would be as science-based as proponents tout. How the NUFA can protect America’s citizens from harm by imposing federal requirements less stringent than many existing states’ requirements is decidedly unclear.

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