Case No. 20-2124

In the United States Court of Appeals
for the Tenth Circuit

ROBIN THORNTON and MICHAEL LUCERO,

Plaintiffs-Appellants,

v.

TYSON FOODS, INC; CARGILL MEAT SOLUTIONS, CORP.; JBSUSA FOOD CO.; and NATIONAL BEEF PACKING CO., LLC,

Defendants-Appellees.

On Appeal from the United States District Court for the District of New Mexico
Judge Kea W. Riggs
Cases Nos. 1:20-cv-105-KWR-SMV & 1:20-cv-106-KWR-SMV

AMICUS BRIEF OF RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA AND PUBLIC JUSTICE IN SUPPORT OF NEITHER PARTY URGING VACATUR OR REVERSAL OF THE DISTRICT COURT'S DECISION REGARDING ADVERTISING CLAIMS

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CORPORATE DISCLOSURE STATEMENT

Amici issue no stock and have no parent corporations.

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STATEMENT OF AMICI

The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF") is the nation's largest association exclusively comprised of domestic, independent cattle producers. The promotion of beef from cattle born, raised, or slaughtered outside the United States as equivalent to true, domestically produced beef threatens the viability of R-CALF and its members. Studies and court findings establish that beef born, raised, and slaughtered domestically is more desirable than beef that lacks any one of these attributes. By promoting beef born, raised, or slaughtered abroad as a domestic good, multinational importers reap the benefits of domestic producers' brand, without holding themselves to the same standards. As a result, R-CALF has been at the forefront of promoting mandatory "Country-of-Origin Labeling" for beef, litigating cases on the matter, and lobbying for it at the state and federal level. R-CALF has also challenged claims that all beef is equal. The decision below would improperly narrow the mechanisms available to R-CALF and its members to protect their brand. While the federal government unfortunately allows imported beef to be *labeled* "Product of USA"—a decision even it recognizes may be confusing and misleading—it does not regulate meat *advertising* whatsoever. Thus, R-CALF submits this brief to preserve the ability to challenge such advertisements, and thereby highlight the exploitation of domestic producers' brand, which undermines domestic agriculture.

Public Justice is a national legal advocacy organization. It works to ensure that all sorts of plaintiffs can access the courts and hold corporate wrongdoers accountable. Through its Food Project, Public Justice focuses especially on the ways in which corporate consolidation in the animal agriculture industry harms producers, workers, consumers, animals, and the environment. Among these exploitative practices, corporate meat producers use false and misleading advertisements to convince consumers their products have the same attributes as independently produced, domestic goods. This is but one way in which the major meat producers successfully employ falsehoods to take market share, resulting in further consolidation and exploitation. Thus, Public Justice submits this brief to ensure, where appropriate, consumers' rights are protected and they can bring cases that demonstrate the ways in which the industry relies upon tricking the public.

Consistent with Rule 29(a)(4)(E), *amici*'s counsel authored this brief, no party's counsel authored the brief in whole or in part, and no party beyond *amici* contributed any money towards the brief.

I. INTRODUCTION

The district court erred in holding false advertising claims are preempted by the Federal Meat Inspection Act ("FMIA"). *Amici* take no position on its holding that Plaintiffs cannot challenge Defendants' labels. The U.S. Department of Agriculture ("USDA") allows beef to be labeled "Product of USA" when an importer simply unwraps and rewraps a foreign product. *See* Peter Chang, *Country of Origin Labeling: History & Public Choice Theory*, 64 Food & Drug L.J. 693, 699 (2009).[1] Even the agency recognizes this "may be misleading to consumers and may not meet consumer expectations of what 'Product of USA' signifies."[2] However, the FMIA provides that states may not impose "[m]arking, labeling, packing, or ingredient requirements in addition to, or different than," those of USDA. 21 U.S.C. § 678. As such, the FMIA's language intends to preempt *labeling* claims that challenge USDA-approved *labels*. *See Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 765 (10th Cir. 2010) ("State laws are expressly

[1] *See also* Aplt App 553 (district court describing USDA guidance that allows beef "canned, salted, rendered, deboned, etc." in the United States to be labeled "'Product of the U.S.A'").

[2] Letter from Rachel A. Edelstein, Acting Assistant Adm'r, Off. of Pol'y & Program Dev., Food Safety & Inspection Serv., USDA, to Elizabeth Drake, Schagrin Assocs. (Mar. 26, 2020), https://www.fsis.usda.gov/wps/wcm/connect/dba58453-e931-4c1d-9b4e-fb36417049ce/19-05-fsis-final-response-032620.pdf?MOD=AJPERES.

preempted when they fall within the scope of a federal provision explicitly precluding state action.").

The district court erred in two different ways by extending the FMIA to preempt claims the products were falsely advertised. First, no advertisement claims were plead here, so it was improper for the district court to opine on whether false advertising claims are preempted. Second, unlike labels, advertisements are not mentioned in the FMIA. Moreover, its regulatory scheme demonstrates Congress solely sought to establish federal control over claims connected to the physical product, not those appearing in advertisements. Accordingly, the district court was unable to point to a single piece of evidence from the statute, regulations, or legislative history indicating Congress wished to preempt false advertising claims. Such evidence is required before a claim can be preempted. Therefore, its holding was incorrect as a matter of law.

Remedying these errors is particularly important because companies' false and misleading claims are distorting the market. Consumers want to know the origin of their beef, and they prefer domestic beef. Peer-reviewed academic research demonstrates consumers are willing to pay a premium simply to know where their beef was born, raised and slaughtered, and are willing to pay 19% more for a steak that was "guaranteed" to have been born and raised in the United States. Wendy J. Umberger et al., *Country-of-Origin Labeling of Beef Products: U.S. Consumers'*

Perceptions, 34 J. Food Distribution Res. 103, 113-14 (2003). Nationwide surveys confirm these results, with 90% of consumers expressing they want to know the origin of their meat, Consumer Fed'n of America, *Large Majority of Americans Strongly Support Requiring More Information on Origin of Fresh Meat* (May 15, 2013),[3] and 93% wanting to know if their meat comes from outside the United States, Consumer Reports Nat'l Res. Ctr., *Food Labels Survey* 3, 9 (Apr. 6, 2016).[4] A district court likewise concluded domestic, independent cattle producers are harmed when imported meat can be portrayed as domestic, because importers can hold down "the demand for and therefore sales of [domestic cattle producers'] goods and services" that would be otherwise present for true domestic products. *R-CALF USA v. United States Dep't of Agric.*, No. 2:17-CV-223-RMP, 2018 WL 2708747, at *4 (E.D. Wash. June 5, 2018).

But, as USDA researchers explain, an increasing number of cattle are born and raised in Canada and Mexico but are considered to be "domestic," meaning that the resulting beef may be labeled as a product of the United States—leaving consumers without any way to distinguish between beef raised domestically and beef that is not. *See* Michael J. McConnell et al., US Dep't of Agriculture, Econ. Res.

[3] https://consumerfed.org/pdfs/CFA-COOL-poll-press-release-May-2013.pdf.

[4] https://www.ftc.gov/system/files/documents/public_events/975753/cr_intro_and_2016_food_survey.pdf.

Serv., *US red meat production from foreign-born animals*, 3 Agric. Sci. 201, 207 (2012).[5]

That isn't an accident. Most beef is produced by an oligopoly of multinational firms that rely on imports. Four firms process approximately 85% of cattle reared for beef production in the United States. Unfair Practices & Undue Preferences in Violation of the Packers & Stockyards Act, 81 Fed. Reg. 92,703, 92,711 (proposed Dec. 20, 2016). That is more than double the market power necessary to form an oligopoly. Mary Hendrickson et al., *Power, Food and Agriculture: Implications for Farmers, Consumers and Communities* 14 (Nov. 1, 2017).[6] Moreover, the beef oligopoly is made up of multinational firms that are horizontally and vertically integrated. This provides them a "captive supply" of animals and carcasses they can import from around the world. C. Robert Taylor, *The Many Faces of Power in the Food System* 4 (Feb. 17, 2004).[7]

As a result, the National Cattlemen's Beef Association ("NCBA")—an association for the multinational beef companies—explains their strategy is to convince consumers they should not regard "feeder cattle from Canada or Mexico . . . any different than we do a steer born, raised and slaughtered right here

[5] https://www.scirp.org/pdf/AS20120200006_23587394.pdf.
[6] https://ssrn.com/abstract=3066005.
[7] https://www.justice.gov/sites/default/files/atr/legacy/2007/08/30/202608.pdf.

at home." Scott George, *The Fallacy of COOL*, NCBA (May 30, 2013), https://www.ncba.org/ourviews2.aspx?NewsID=2942. That strategy is contrary to consumer demand: 93% of consumers believe beef from cattle born and raised in Mexico and slaughtered in the United States should be labeled to reflect the beef's Mexican origins—and not simply called a product of the United States. *Food Labels Survey*, *supra*, at 9.

Put simply, the major meat packers seek to leverage their market power and supply lines to associate foreign products with domestic ones, so that consumers wrongly attribute their positive views of domestic goods to meat born, raised and/or slaughtered outside the United States. This Court should not further tilt the marketplace against domestic producers by unnecessarily and baselessly extending federal labeling rules—which USDA acknowledges are problematic—to prohibit false advertising claims. In holding otherwise, the district court removed one of the few remaining mechanisms to create a transparent and competitive market, a mechanism that has long stood under our federalist system and Congress has shown no interest in removing. The district court's false advertising ruling should be vacated.

II. SUMMARY OF ARGUMENT

The district court's decision to extend the FMIA's reach to preempt state claims regarding meat advertisements is wrong for two independent reasons. *See*

Aplt App 559-60. First, plaintiffs failed to plead a false advertising claim. Therefore, it was unnecessary and improper for the district court to address this issue. In opining on whether false meat advertising claims are preempted, the district court disregarded this Court's precedent that it should "not reach" questions that the plaintiff has "not plead." *Kleier Advert., Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1044 n.8 (10th Cir. 1990).

Second, the district court was also wrong on the merits. Congressional intent is the touchstone of any preemption analysis, and the lower court offered nothing more than its bare assertion that false meat advertising claims are preempted by the FMIA. *See* Aplt App 559-60. Contrary to the requirements of Supreme Court and circuit precedent, the district court failed to cite any statutory language or legislative history justifying preemption. *See, e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1677 (2019) ("[W]e 'assum[e] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). In fact, it ignored substantial affirmative evidence Congress wished such claims to proceed. Its false advertising decision cannot stand as a matter of law.

III. ARGUMENT

A. The District Court Erred in Opining on Whether False Advertising Claims Are Preempted.

This Court need not address the district court's analysis of whether false meat advertising claims are preempted. The district court's statements on that issue were improper because the claim was not before it.

This Court has been clear that a motion to dismiss on the merits, like the one that led to this appeal, concerns "the sufficiency of the allegations within the four corners of the complaint." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994); *see also Bremer v. Ass'n of Flight Attendants-CWA*, 599 Fed. App'x. 844, 845 (10th Cir. 2015) (unpublished) (refusing to consider a theory not presented in the complaint); *Strayhorn v. Wyeth Pharm., Inc.*, 737 F.3d 378, 399 (6th Cir. 2013) (on a motion to dismiss a court should "consider 'only those facts alleged in the plaintiffs' complaint and the reasonable inferences that can be drawn from those facts'" (citation omitted)); *Casella v. Borders*, 404 Fed. App'x 800, 803 n.2 (4th Cir. 2010) (unpublished) ("The Court will not consider facts not pled[.]"). Accordingly, this Court has construed plaintiffs' arguments narrowly when a broader reading would require it to reach outside "the four corners" of the complaint. *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010).

Yet, in passing on the propriety of false meat advertising claims, the district court significantly expanded the facts alleged. The two consolidated complaints in this matter, one on behalf of an alleged consumer class and one on behalf of an alleged producer class, are essentially duplicates of one another. They make clear they are concerned with the defendant meat companies' false *labeling*, not any *advertising*.

In their introductions describing the "Nature of the Action" the complaints identically allege, "Defendants have been labeling beef that is imported into the U.S. post slaughter as 'Product of the U.S.' or some similar label designed to give the impression" that the product is domestic. Aplt App 33, 98. In the first paragraph of a section titled "Substantive Allegations," the complaints explain their concern is "a product that is labeled 'Product of the U.S.' generates a confidence in the consumer that the beef they are about to purchase is from an American rancher." Aplt App 35, 101. Both complaints identify identical examples of the defendant meat companies' false and misleading statements, which the complaints explain appear exclusively on the defendants' "packaging." Aplt App 36-44, 102-10. The complaints go on to allege that such claims are problematic because "[t]he packaging, with its 'Product of United States' [claim] … with no accurate representation of country of origin" leads consumers to conclusions about where "the Products are actually derived … that may not be true at all." Aplt App 44, 110. Relatedly, the only substantive

allegation establishing standing for the consumer class representative is that she "relie[d] on the label representations" including "Product of the U.S.," leading her to be misled. Aplt App 33.

The complaints twice mention advertising, as compared to the 42 times the producer complaint discusses labeling and the 20 times the consumer complaint does. These passing references to advertising—one of which appears in a heading and not an allegation of fact—are insufficient to raise a false advertising claim. Indeed, both complaints detail that Defendants' only conduct at issue is their false labeling. The complaints' sole allegation that reaches beyond the labels is that Defendants' "representations that are prominent" on labels led retailers—who are not named defendants in the cases—to make equivalent representations. Aplt App 36-44, 102-10. They do not describe those additional representations, failing to allege that they appear in advertisements. Instead, the only evidence of those "representations" are pictures reproduced in the complaints. *Id.* Those pictures solely concern what appear to be in-store signage and circulars. *See id.*

In other words, the complaints make *no* allegations that the named Defendants engaged in false advertisements, rather than false labeling. Instead, in a brief aside, they claim they are also seeking to hold Defendants accountable for statements made by others. Aplt App 550 (district court opinion explaining "[b]oth Plaintiffs assert that Defendants are misleading retailers and consumers by labeling their beef

'Product of the USA'"). Those additional statements are also not advertisements. The Supreme Court has indicated "literature" that is "designed for use" at the point of sale, such as an in-store circular like those depicted in the complaints, should be viewed as equivalent to a label. *Kordel v. United States*, 335 U.S. 345, 350 (1948). As a result, even the most generous reading of the complaints does not allege any non-label false or misleading meat advertisements.[8]

This Court has stated it is "both ludicrous and inconsistent" to construe a "passing reference" in a complaint that is not born out by the remaining facts to allege an alternative theory of liability. *Bella v. Chamberlain*, 24 F.3d 1251, 1257 n. 8 (10th Cir. 1994); *see also Canfield v. Douglas Cty.*, 619 Fed. App'x. 774, 778 (10th Cir. 2015) (unpublished) (assertions without supporting factual allegations "do not suffice" to state a claim); *Chouteau v. Enid Mem'l Hosp.*, 992 F.2d 1106, 1109 n.3 (10th Cir. 1993) (refusing to pass on issue on appeal when the "four corners of the complaint" did not lay out necessary allegations). Here, the complaints incant the word "advertisements" twice, but fail to identify any. Instead, their allegations

[8] Plaintiffs' motion to dismiss briefing confirms this reading of their complaints. While the briefs state Plaintiffs have raised false advertising and labeling claims, in the same breadth they explain any "ads" at issue are produced by "retailers" not the named Defendants. Moreover, in their briefing, Plaintiffs only point to a single instance in which the "ads" exist outside the store. To do so, they rely on an unauthenticated exhibit purporting to show that a single in-store circular was also mailed to consumers, facts that do not appear in either complaint. Aplt App 279 & n.1.

make plain their concern was only with statements on labels. Thus, they do not state a false advertising claim and the district court was incorrect to discuss whether false advertising claims are preempted by the FMIA. In light of this Court's precedent, it can and should correct this error by simply vacating that portion of the opinion below.

B. The FMIA Does Not Preempt False Advertising Claims.

Were this Court to consider whether the FMIA preempts false meat advertising claims, it should hold the district court erred: The FMIA does not preempt such claims. There are three types of preemption—express, field, and conflict—and defendants have not carried their burden to prove any of them. Regardless of defendants' failure to produce the necessary record, it is evident none of them apply. Indeed, the district court appears to concede the only way the FMIA could preempt false advertising claims is through a court concluding such claims are conflict preempted because they stand as an obstacle to the FMIA's goals. Aplt App 559-60 ("[A]llowing this [false advertising] claim would undermine Congress's ,intent to create uniform standards for describing meat products under conflict preemption."). Yet, the decision below fails to point to any indication that Congress intended, in enacting the FMIA, to preempt state-law advertising claims because there is none. The courts cannot impose their belief of what Congress should have wanted to expand a law's preemptive effect.

i. Legal principles.

"Preemption may occur in three situations: (1) express preemption, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law … ; (2) field preemption, which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it; and (3) conflict preemption, which occurs either [i] when compliance with both the federal and state laws is a physical impossibility, or [ii] when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998).

No matter the type of preemption, the Supreme Court has made clear preemption analysis "must be guided by two cornerstones": (1) "the purpose of Congress is the ultimate touchstone"; and (2) "particularly in those [cases] in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565 (cleaned up); *see also Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1242 (10th Cir. 2011).

Regulating advertising is traditionally within the purview of the states. *See, e.g.*, *Chae v. SLM Corp.*, 593 F.3d 936, 944 (9th Cir. 2010) (consumer protection

traditionally in "state law enforcement hands"); *Farm Raised Salmon Cases*, 175 P.3d 1170, 1176 (Cal. 2008) ("Laws regulating the proper marketing of food, including the prevention of deceptive sales practices, are likewise within states' historic police powers."); *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prod. Liab. Litig.*, 288 F. Supp. 3d 1087, 1218 (D.N.M. 2017); *Gilles v. Ford Motor Co.*, 24 F. Supp. 3d 1039, 1047 (D. Colo. 2014). Thus, courts can only find false advertising claims preempted if the evidence of congressional intent overcomes a robust presumption against preemption. *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1094 (10th Cir. 2015) (preemption requires a higher evidentiary burden "where (as here) the area of law in question is one of traditional state regulation like public health and safety").

As this analytical approach indicates, preemption is an affirmative defense. *See, e.g.*, *N.Y. Pet Welfare Ass'n, Inc. v. City of New York*, 850 F.3d 79, 86-87 (2d Cir. 2017). The party asserting preemption needs to point to statutory "language, structure, or history" that sufficiently establishes Congress wished to displace state law. *Cook*, 790 F.3d at 1094.

ii. The FMIA's regulatory scheme.

The FMIA's text "explicit[ly]" defines and limits its reach. *See Int'l Bhd. of Elec. Workers, Local Union No. 1245 v. Pub. Serv. Comm'n of Nevada*, 614 F.2d 206, 210 (9th Cir. 1980). It provides states may not impose "[m]arking, labeling,

packaging, or ingredient requirements in addition to, or different than," those USDA approves under the FMIA. 21 U.S.C. § 678. And while the express preemption provision preserves state-law jurisdiction over claims that meat is misbranded, labeling does not misbrand a meat product under the FMIA if the labeling has been approved by USDA under the FMIA. *See Nat'l Broiler Council v. Voss*, 44 F.3d 740, 748-49 (9th Cir. 1994)[9]; *see also Armour & Co. v. Ball*, 468 F.2d 76, 84 (6th Cir. 1972).

The remainder of the statute confirms it is narrowly concerned with product claims physically connected to the product, making them a "marking, labeling, or packaging." USDA reviews "marking, labeling and packaging" together, having a single form for "Application[s] for Approval of Labels, Marking or Device." Food Safety and Inspection Service ("FSIS") Form 7234-1.[10] Both that form and USDA regulations require a seller to submit a mockup of the specific product label for USDA to review before it can be used consistent with the FMIA. 9 C.F.R. § 412.1 ("No final label may be used on any product unless the label has been submitted for approval to the FSIS Labeling and Program Delivery Staff[.]"); FSIS Form 7234-1

[9] *National Broiler Council* involved poultry labeling, and poultry labels are governed by an equivalent scheme to meat labels, known as the Poultry Products Inspection Act ("PPIA"). The PPIA's express preemption provision is identical to that of the FMIA. 21 U.S.C. § 467e.

[10] https://www.fsis.usda.gov/wps/wcm/connect/4aeeca8c-8ba6-4288-a222-e6ca8764a9f7/FSIS_7234-1_Approval_of_Labels.pdf?MOD=AJPERES.

(detailing a complete sketch of the label is required for approval). While USDA produces a "Policy Book" explaining typically approved uses of certain terms, the book underscores the agency must review each label individually before it can be approved and used. Food Safety and Inspection Service, Food Standards and Labeling Policy Book, Preface (2005).[11] Following the Policy Book does not "guarantee an authorization." *Id.* at 2.

In sum, the FMIA empowers USDA to consider and regulate meat product claims in a specific context, when they appear on or around the physical product. USDA does not look at other descriptions of the product. In other words, the statute provides USDA no "authority or jurisdiction" to assess whether "*non-label advertising*" of meat products is "false or misleading to the consumer public." *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 549 F. Supp. 2d 708, 719 (D. Md. 2008) (emphasis in original).

iii. Application of preemption law to the FMIA scheme.

Given this scheme, the FMIA cannot be said to preempt false advertising claims under any form of preemption. Unlike claims involving labeling or packaging, claims about advertising cannot be held to be expressly preempted by the

[11] https://www.fsis.usda.gov/wps/wcm/connect/7c48be3e-e516-4ccf-a2d5-b95a128f04ae/Labeling-Policy-Book.pdf?MOD=AJPERES

FMIA because its express preemption provision makes no mention of state rules governing advertising, or, indeed, any mention of advertising at all. 21 U.S.C. § 678.

The gaps left in that law's regulatory scheme also establish there is no field preemption. *See Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 337 (3d Cir. 2009) ("It does not appear that Congress has regulated so comprehensively in either the food and beverage or juice fields that there is no role for the states."). Indeed, as demonstrated above, state advertising laws have long operated alongside federal law and Congress has not sought to exert power over them.

It is also plain that it is not impossible to comply with the FMIA's federal labeling scheme and state advertising laws, the first type of conflict preemption. That a state could limit what is depicted in an advertisement in no way prohibits the same words from appearing on the product in the store. This is true even if "the advertisements appear to merely be a picture of the USDA approved label." Aplt App 559. Nothing in USDA's regulations requires or entitles an entity to reproduce labels as part of advertisements. Therefore, an entity could choose to label and advertise its product differently. Moreover, use of "Product of USA" in particular is optional—nothing requires a seller to use that claim on labels. Therefore, if an entity wished to reproduce its labels in its advertisements, it could abide by the federal labeling requirements and state advertising requirements by adding any necessary

clarifications or disclaimers to "Product of USA" claims in its advertisements, or it could choose not to make the "Product of USA" claim at all.

Thus, as the district court recognized, the issue comes down to whether state false advertising laws pose an obstacle to carrying out FMIA's label approval scheme, the other type of conflict preemption. Like with all other forms of preemption, the Supreme Court has emphasized that determining whether a state law poses an obstacle to a federal statute turns on what Congress intended to accomplish with its law. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 399-400 (2012) ("[S]tate laws are preempted . . . where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (citation omitted)). Likewise, the Court has underscored that the burden of establishing that a state law creates an obstacle rests with the party alleging preemption. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

For example, the Supreme Court found a state law was an obstacle to federal immigration law where the proponent of preemption produced legislative history demonstrating Congress had considered and rejected criminalizing certain actions the state law criminalized. *Arizona*, 567 U.S. at 404-07. Similarly, the Court held a state law that imposed penalties for doing business with Burma was conflict preempted because it was established the federal statute was carefully calibrated to

give flexibility to the President to manage Burma sanctions on his or her own. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374-80 (2000).

Here, in contrast, the district court held the state advertising laws created an obstacle to the FMIA's objectives without citing a scintilla of statutory language, structure, or legislative history to substantiate its holding. It asserted Congress intended USDA to approve ways to "describ[e] meat products," Aplt App 559, but there is no basis for the statement. Congress stated its goal was to ensure a uniform regime of "labeled and packaged meat," but expressed no interest in regulating other types of communications with consumers, such as advertising. 21 U.S.C. § 602. Hence, USDA engages in review of labels to determine whether the "claims" as they would be read by a consumer who is able to pick-up and study that label would be misled. 21 U.S.C. § 678. Nothing in the FMIA allows USDA to approve the "terms" or "claims" that can be used to describe a product in circumstances beyond their use on the label.

This history, in fact, provides evidence Congress did *not* intend to preempt state advertising claims. The Supreme Court has explained that where preemption is alleged in an area of law traditionally subject to state regulation, and where Congress must have been "aware of the prevalence of state tort litigation," courts should conclude Congress "surely would have enacted an express pre-emption provision" had it "thought state-law suits posed an obstacle to its objectives." *Merck Sharp*, 139

S. Ct. at 1677 (cleaned up) (quoting *Wyeth*, 555 U.S. at 574-75). Where there are many longstanding state rules and causes of action, like as there are around food advertising, if Congress has had the opportunity to expressly enact and amend its statute to preempt state law, and chosen not to so, that is affirmative evidence *against* conflict preemption. *Cf. POM Wonderful LLC v. Coca-Cola Co*., 573 U.S. 102, 114 (2014) (Congress's decision not to enact "a provision addressing the preclusion of other federal laws that might bear on food and beverage labeling" provides "powerful evidence" Congress did not intend that result).

Moreover, because USDA's review process is focused on considering statements in the context of the label as a whole, courts recognize the fact that the agency deems statements acceptable in that context does not indicate those same statements are not misleading in advertisements, *i.e.*, there is no conflict between federal approval and state false advertising claim. *Cf. In re Bayer Corp.*, 701 F. Supp. 2d 356, 376 (E.D.N.Y. 2010) (that statements met federal regulatory floor did not mean they were not misleading under state law). The case law explains, "language that is technically and scientifically accurate on a label can be manipulated in an advertisement to create a message that is false and misleading to the consumer." *Organic Consumers Ass'n v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005, 1014 (N.D. Cal. 2018) (citation omitted). Thus, even if advertisements reproduce an image of a label, a state imposing requirements on those images poses no barrier to USDA

providing its approval, which only endorses the labels' claims when a consumer can carefully review the entire product package. Through the FMIA, Congress seeks to ensure USDA establishes a uniform regime of language in a specific setting. Logically, the agency might reach different results regarding labels than state false advertising law would in the distinct context of advertisements. That is entirely consistent because how consumers interact with labels and advertisements is distinct.

Accordingly, the Eighth Circuit has stated "nothing in the text of the FMIA indicates an intent to preempt state unfair-trade-practices laws in general, nor have we found any cases" suggesting as much. *United States v. Stanko*, 491 F.3d 408, 418 (8th Cir. 2007). The Ninth Circuit upheld a state law restricting poultry "advertis[ing]," while striking down its provisions governing labeling as preempted. *Nat'l Broiler Council*, 44 F.3d at 748-49; *see also id.* at 749 (O'Scannlain, concurring) ("California stores can still be required by state law to tell the truth in advertising" of chicken, as anything else would be "a retreat from the battle scene of federalism."). Likewise, a district court has held state-law unfair trade practices claims relating to advertising and promotion of the poultry products were "not preempted as [they did] not conflict with or enforce additional requirements from those of the PPIA." *Drayton v. Pilgrim's Pride Corp.*, 2004 WL 765123, at *6 (E.D. Pa. Mar. 31, 2004); *see also* Nat'l Consumer Law Center, Unfair and Deceptive Acts

and Practices § 2.4.9, p. 186 (9th ed. 2016) (unfair trade practices "claims that do not relate to the marking or labeling of meat or poultry on the packaging itself, and therefore do not present a direct obstacle to the enforcement of federal law, should not be preempted").

The entire support for the district court's alternative outcome in this case is a two sentence footnote in *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312 (S.D. Fla. 2017), and an unpublished out-of-circuit opinion *Kuenzig v. Hormel Foods Corp.*, 505 Fed. App'x. 937 (11th Cir. 2013) (unpublished). Aplt App 560. These cases should be dismissed as the unpersuasive precedent they are. Like the decision below, both fail to examine the relevant statute or legislative history, ignoring the core of preemption analysis. *Kuenzig*, 505 Fed. App'x at 939; *Phelps*, 244 F. Supp. 3d at 1317 n.2. Indeed, *Kuenzig* cites no authority for its outcome, and *Phelps*' only authority is an earlier district court decision in *Kuenzig*, which held the FMIA did *not* preempt challenges to statements on the defendant's website and in advertising, but did preempt claims relating to the same text on the company's labels. *Phelps*, 244 F. Supp. 3d at 1317 n.2 (citing *Kuenzig*, 2011 WL 4031141, at *10 (M.D. Fla. Sept. 12, 2011)).[12]

[12] Earlier in its opinion, the district court cites *National Meat Association v. Harris*, 565 U.S. 452 (2012), for the notion that the FMIA's preemption provision is broad. Aplt App 556. *National Meat Association*, however, concerned express, not obstacle, preemption and therefore its analysis is inapplicable to determining

The courts are directed to start with a presumption against preemption, particularly in cases such as this. Yet, here, based entirely on baseless assertions in non-binding cases, the lower court held that once the government approves a meat label, it preempts a false advertising claim about that product. This analysis not only lacks rigor, but any of the evidence the Supreme Court has said is required to support preemption. Further still, it is contrary to what evidence there is. Therefore, should this Court reach the question of whether the FMIA preempts state false advertising claims, and it should not, the district court should be reversed.

IV. CONCLUSION.

Amici take no position on the district court's holding dismissing the false labeling claims here, the only claims truly raised. However, the district court erred in looking beyond the four corners of the complaint to rule on whether false advertising claims can stand. Moreover, its advertising preemption decision is erroneous and will further narrow the already limited tools producers and consumers

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whether there is conflict preemption. *See* 565 U.S. at 459-60. Demonstrating just how distinct *National Meat Association* is from this case, the state law in question there prohibited the slaughter and sale of non-ambulatory animals. *Id.* at 458-59. The FMIA regulates the handling of non-ambulatory animals, permitting their slaughter for sale in some circumstances, and expressly preempts state laws to the contrary. *Id.* at 460. As a result, as the Supreme Court detailed, the state law at issue in *National Meat Association* was in direct conflict with the FMIA's text, fully prohibiting slaughter and sale, where the FMIA allowed for certain slaughters and sales. *Id.* at 463-64.

have to correct the market. The district court's advertising ruling should be vacated or, in the alternative, reversed.

December 7, 2020

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 5,624 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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December 7, 2020

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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December 7, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on the December 7, 2020, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to the following:

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