No. 19-CV-0397

DISTRICT OF COLUMBIA COURT OF APPEALS

ANIMAL LEGAL DEFENSE FUND,

Appellant,

v.

HORMEL FOODS CORPORATION,

Appellee.

On Appeal from the Superior Court of the District of Columbia
Civil Division No. 2016 ca 004744 B
(Hon. Anthony C. Epstein, Judge)

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN SUPPORTING APPELLANTS

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August 6, 2019

CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a District of Columbia nonprofit corporation that issues no stock. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Public Citizen is a nonprofit consumer-advocacy organization with members and supporters in the District of Columbia and all 50 states. Public Citizen is devoted to research, advocacy, and education on a wide range of public-health and consumer-safety issues. Of particular relevance here, Public Citizen is concerned about the invocation of federal preemption by a variety of industries to avoid state consumer protections and to cut off consumers' access to the civil justice system. Public Citizen has participated as amicus curiae in many cases involving the issue of preemption of state law in the context of food and beverage marketing, including *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012), *In re Aurora Dairy Corp. Organic Milk Marketing & Sales Practices Litigation*, 621 F.3d 781 (8th Cir. 2010); *Holk v. Snapple*, 575 F.3d 329 (3d Cir. 2009), as well as in the context of other consumer products, *see, e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019) (prescription drugs); *Jones v. Medtronic, Inc*., 745 Fed. App'x 714 (9th Cir. 2018) (medical devices); *New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (restaurant menus).

Public Citizen submits this brief to address the Superior Court's holding that federal regulation of meat labeling preempts claims brought pursuant to the false-advertising prohibition of the District of Columbia Consumer Protection Procedures Act (CPPA). Because, as explained below, state consumer-protection remedies for

false advertising do not interfere with federal authority over labeling, the Superior Court's preemption holding should be reversed.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In a series of print, web, and video advertisements, Hormel Foods Corporation (Hormel) has touted its "Natural Choice" line of lunch meats and bacon as a "clean" and "honest" alternative to other deli meats—one held to "higher standards" and without any added "preservatives," "nitrates," or "nitrites." JA A61–A62 (Compl. ¶¶ 212–13). The Animal Legal Defense Fund (ALDF) challenged these assertions from Hormel's nationwide "Make the Natural Choice" advertising campaign, arguing that they violate the false-advertising prohibition of the CPPA. Through this action, ALDF sought to vindicate consumers' "enforceable right to truthful information from merchants about consumer goods and services"—including information provided in advertising campaigns. D.C. Code § 28-3901(c).

The Superior Court held that ALDF's challenges to product claims made in print, web, and video advertisements were impliedly preempted by the Federal Meat Inspection Act (FMIA) and Poultry Production and Inspection Act (PPIA), two federal laws that give the United States Department of Agriculture (USDA) authority over meat labeling. Although the PPIA and FMIA do not give the UDSA authority

over advertising, the Superior Court nonetheless found that the plaintiff's claims posed an "obstacle" to the federal government's system of labeling oversight.

That conclusion is incorrect. Holding meat producers accountable under the CPPA for misleading statements in advertising would not interfere with the federal government's regulatory authority or decisions approving labels because labeling and advertising are distinct. For this reason, courts have generally concluded that a variety of federal laws creating labeling oversight do not preempt unfair trade practices claims related to advertising. Because the plaintiff's false advertising claims pose no obstacle to the objectives of the FMIA and PPIA, this Court should reverse the Superior Court's holding that ALDF's CPPA claims are preempted.

ARGUMENT

The FMIA and the PPIA delegate to USDA the authority to regulate the labels used on meat and poultry products in the United States. *See* 21 U.S.C. §§ 457(b) (PPIA), 607(c) (FMIA). Under these statutes, USDA is responsible for, among other things, setting applicable "labeling requirements," including "the styles and sizes of type to be used," definitions and "standards of identity," and "standards of fill of container." *Id.* §§ 457(b) (PPIA), 607(c) (FMIA). The statutes define a "label" as "a display of written, printed, or graphic matter upon the immediate container (not including package liners) of any article," and "labeling" as "labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers,

or (2) accompanying such article." 21 U.S.C. §§ 453(s) (PPIA); 601(o)–(p) (FMIA). Because in-store promotional material and fliers "accompany" the products, they constitute labeling as well. *See Meaunrit v. ConAgra Foods, Inc.,* No. C 09-02220 CRB, 2010 WL 2867393 at *8 (N.D. Cal. July 20, 2010) (citing *Kordel v. United States*, 335 U.S. 345, 349–50 (1948)); USDA, A Guide to Federal Food Labeling Requirements for Meat, Poultry, and Egg Products, 14 (2007), https://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f9820012d/Labeling_Requirements_Guide.pdf?MOD=AJPERES ("label" includes point-of-purchase materials, including brochures). Implementing its authority under the PPIA and the FMIA, the USDA reviews and approves (or disapproves) the text and graphics on meat labels. *See* 9 C.F.R. § 412.1.

The FMIA and PPIA each contain an express preemption provision. Those provisions state, in relevant part:

> Marking, labeling, packaging, or ingredient requirements … in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any … establishment in accordance with the requirements under this chapter ….

21 U.S.C. § 467e (PPIA); *id.* § 678 (FMIA).

In this case, plaintiff ALDF challenged a number of assertions in Hormel's "Make the Natural Choice" advertising campaign. In particular, ALDF challenged Hormel's advertisements claiming that its Natural Choice products are "natural,"

"all natural," or "100% natural," and that they contain no added preservatives. JA A34–A35 (Compl. ¶¶ 60–63). ALDF's complaint contends that these claims are false and otherwise misleading because, among other reasons, Hormel gives its animals hormones and other drugs, *id.* A44 (Compl. ¶ 87), and its products contain preservatives, *id.* A35, A38, A43, A45 (Compl. ¶¶ 63, 65, 67, 77, 94, 96). ALDF alleged that these representations violate the CPPA's prohibitions on unfair trade practices. *See* D.C. Code § 28-3904.

Because ALDF's claims do not directly challenge the language on Hormel's Natural Choice labels, the FMIA and PPIA do not expressly preempt them, as the Superior Court seemed to recognize. *See* JA A119 (Order at 22). The Superior Court dismissed ALDF's claims on the basis of implied conflict preemption, however, holding that "applying the CPPA to prohibit the use of terms that USDA approved would stand as an obstacle to the accomplishment of Congress' purposes for consistent regulation of labeling of meat and poultry products." *Id*. A118 (Order at 21). As explained below, that holding is incorrect.

I. Congress, federal agencies, and courts have recognized that labeling and advertising are distinct.

Manufacturers of consumer products present information to potential customers in a range of ways—from product packaging and in-store promotional signs to television, print, web, and social media advertisements. As marketing researchers have noted, consumers may react differently even to identical

information when presented in different media and surrounded by different contexts. *See, e.g.*, J. Craig Andrews, Richard G. Netemeyer, & Scot Burton, *Consumer Generalization of Nutrient Content Claims in Advertising*, 62 J. Marketing 62, 62 (1998) (recognizing "the inherent differences between advertising and package information processing," including, for example, the availability of Nutrition Facts Panel information to help "interpret[] and evaluat[e]" claims on packages). "[C]ommon sense suggests even '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) (quoting *Sanderson Farms, Inc. v. Tyson Foods, Inc*., 549 F. Supp. 2d 708, 720 (D. Md. 2008)).

As the Federal Trade Commission (FTC) has explained, because consumers react differently to labeling and advertising, even "claims that would technically comply with … labeling regulations might be deceptive in advertising if the context of the ad renders the express message of the claim misleading." FTC, Enforcement Policy Statement on Food Advertising (May 13, 1994), https://www.ftc.gov/public-statements/1994/05/enforcement-policy-statement-food-advertising. For this reason, the FTC has "caution[ed] advertisers to consider carefully the importance of the context in which they make claims." *Id.* Courts, too, have recognized that "context may create inherent consumer deception even where an advertisement is

facially truthful." *FTC v. Brown & Williamson Tobacco Corp*., 778 F.2d 35, 42 n.4 (D.C. Cir. 1985) (internal quotations omitted).

In light of the differences between labeling and advertising, Congress has, for several types of products, vested control over labeling and advertising in different federal agencies. For example, the Food and Drug Administration (FDA) regulates the labeling of dietary supplements, while the FTC oversees advertising of those products. *See* FDA & FTC, Memorandum of Understanding, 36 Fed. Reg. 18539 (Sept. 16, 1971); *see also* 21 U.S.C. § 343(s) (FDA authority over dietary supplement labeling); *United States v. Daniel Chapter One*, 896 F. Supp. 2d 1, 2 (D.D.C. 2012) (FTC enforcement action concerning misleading dietary supplement advertising). Whereas the FDA's review of labels focuses on whether dietary supplement labeling includes "unauthorized drug claims," the FTC focuses on whether the dietary supplement advertising includes "false or misleading claims." *E.g.*, *FTC v. Nat'l Urological Grp.*, 645 F. Supp. 2d 1167, 1210 (N.D. Ga. 2008) (granting permanent injunction with respect to dietary supplement advertising challenged by the FTC).

Similarly, the FDA and FTC share jurisdiction over over-the-counter drugs, with the FDA addressing labeling and the FTC addressing advertising. Importantly, the FTC does not necessarily apply to advertising the same standard that the FDA applies to labeling. For example, in *Thompson Medical Co. v. FTC*, 791 F.2d 189

(D.C. Cir. 1986), the D.C. Circuit rejected the argument of a pain-relief cream manufacturer that the FTC was barred from bringing a false-advertising action while the FDA was investigating related claims. The court found "no evidence in the regulatory scheme that Congress has fashioned for over-the-counter medications" to suggest that the FTC could not exercise its regulatory authority over drug advertising while the FDA was conducting its own review of the drug's safety. *Id.* at 192.

Likewise, the Second Circuit has recognized that FDA labeling requirements "simply do not govern" in an FTC proceeding concerning advertising. *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 559 (2d Cir. 1984). In *Bristol-Myers Co.*, the manufacturer of the over-the-counter analgesics Bufferin and Excedrin challenged an FTC order finding that comparative claims in the company's advertisements were deceptive. The company urged the court to overturn the order, arguing that FDA approval of the drugs had "establish[ed]" its claims. *Id.* at 559. Rejecting that argument, the court noted that the FDA, in approving the labeling, had focused on a different set of questions regarding the efficacy of the product and had deployed a different set of standards to determine whether the claims were misleading. *Id.* at 559–60; *see also In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356, 362 n.2 (E.D.N.Y. 2010) (noting that although the FDA does not allow consumer labeling of over-the-counter aspirin to include statements about any

cardiovascular benefits attributed to aspirin, the FTC has allowed advertising claims about low-dose aspirin's asserted cardiovascular benefits).

Likewise, under the FMIA and the PPIA, Congress delegated to the USDA authority over meat labeling. At the same time, federal authority over meat advertising resides in the FTC. *See* USDA, Consumer Use of Information: Implications for Food Policy 11 (July 1999), https://www.ers.usda.gov/webdocs/publications/41905/51665_ah715c.pdf. As in the examples above, by dividing labeling and advertising oversight between two agencies, Congress purposely crafted a system in which different standards could apply to labeling and advertising. *See also POM Wonderful LLC v. Coca-Cola Co*., 573 U.S. 102, 114 (2014) (stating that 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 that Congress did not intend FDA oversight to be the exclusive means of ensuring proper food and beverage labeling") (internal quotation marks omitted)).

II. Because state-law false-advertising claims do not interfere with federal oversight of meat labeling, they are not preempted by the FMIA or PPIA.

Because labeling and advertising are distinct forms of communication, often regulated separately, state-law claims alleging false or misleading advertising present no obstacle to federal oversight of meat labeling. The FMIA and PPIA delegate to the USDA a limited set of powers over meat and poultry inspections and

labeling. At the same time, the statutes reserve significant areas of authority, including advertising, to other parts of the federal government and to the states. ALDF's lawsuit poses no risk to federal labeling oversight.

To begin with, the FMIA and PPIA neither directly nor indirectly regulate advertising. They reserve "[m]arking, labeling, packaging, or ingredient requirements" to the federal government, 21 U.S.C. §§ 467e, 678, but "the USDA does not have jurisdiction over advertising." *Sanderson Farms*, 549 F. Supp. 2d at 716 (capitalization omitted). Although the FTC has authority to address false and misleading meat advertising pursuant to its general authority, all 50 states and the District of Columbia have unfair and deceptive acts and practices laws, such as the CPPA, which co-exist with, and are not preempted by, the FTC Act. *See, e.g.*, *Commonwealth v. AmCan Enters., Inc*., 712 N.E.2d 1205, 1209 n.9 (Mass. App. Ct. 1999) (stating that a state "may adopt regulations that are more restrictive than the rules adopted by the Federal Trade Commission, as long as they are not inconsistent with those rules").

Because the USDA does not oversee advertising under the PPIA and FMIA, "[a]llowing plaintiffs to proceed with their *advertising* claims in no way undermines the PPIA's objectives of ensuring that poultry products are 'wholesome, not adulterated, and properly marked, labeled, and packaged,'" and does not interfere with "the FMIA's nearly identical objectives." *Organic Consumers Ass'n*, 284 F.

Supp. 3d at 1013–14 (quoting 21 U.S.C. § 451 and citing 21 U.S.C. § 602). In *Organic Consumers Ass'n*, like here, the defendant argued that the plaintiffs' state-law claims challenging advertising claims were preempted because they interfered with the regulatory scheme of the PPIA and FMIA. More specifically, like here, the defendant argued that "allowing plaintiffs to challenge advertising using the same '100% Natural' language approved by the USDA for [its] labels would undermine the USDA's authority and Congress's underlying delegation to the agency." *Id.* at 1014. Rejecting the argument, the court observed that the language approved for labeling "may nonetheless be misleading in other contexts," noting that the advertising included images, representations, and language that went beyond what was included on the USDA approved label. *Id.*

Moreover, it is "certainly [] possible" to "enforce the non-labeling" requirements in state false-advertising laws, "without being able to restrict labeling at the same time." *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 748–49 (9th Cir. 1994) (holding portions of a state law that addressed labeling preempted and severing them from non-preempted portions that regulated advertising). Because advertising is "simply not within the authority or jurisdiction of the USDA," the fact that "the language on which the claim is based was approved for use on labels by the USDA" does not "insulate a company from an allegation of non-label false advertising." *Sanderson Farms*, 549 F. Supp. 2d at 710, 719–20 (denying a motion to dismiss

Lanham Act false advertising allegations). Rather, "the state and federal laws at issue here"—the FMIA, PPIA, and state laws prohibiting false and misleading advertising—"are complementary." *Organic Consumers Ass'n*, 284 F. Supp. 3d at 1013.

Accordingly, other courts—contrary to the Superior Court here—have concluded that 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." Nat'l Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 2.4.9, p. 186 (9th ed. 2016); *see Organic Consumers Ass'n*, 284 F. Supp. 3d at 1013–14 (rejecting argument that USDA approval of "100% Natural" claims on poultry labeling preempted a state-law consumer protection challenge to those claims in an advertising campaign); *Drayton v. Pilgrim's Pride Corp*., 2004 WL 765123, at *6 (E.D. Pa. Mar. 31, 2004) (holding that state-law unfair trade practices claims relating to advertising and promotion of the defendant's meat products were "not preempted as [they did] not conflict with or enforce additional requirements from those of the PPIA").

In an analogous context, courts have recognized that FDA regulation under the Food, Drug, and Cosmetic Act (FDCA) and state-law consumer protection statutes "serve complementary, though somewhat overlapping, roles." *In re Bayer*

Corp., 701 F. Supp. 2d at 370–71. Because the "main purpose of the advertising restrictions set forth in the FDCA [] is not to protect consumers from deceptive advertising, but rather to further the FDCA's underlying goal of ensuring the safety of prescription drugs," room remains for state-law claims focusing on the "truth or falsity of advertising." *Id.* at 371 (alteration in original, internal quotation marks and citations omitted). Thus, the FDCA does not impliedly preempt false advertising actions. *See, e.g.*, *Kanfer v. Pharmacare US, Inc.*, 142 F. Supp. 3d 1091, 1101–02 (S.D. Cal. 2015) (in case challenging advertising statements concerning a dietary supplement, holding state-law claims neither expressly nor impliedly preempted, and noting that "district courts have routinely rejected" the argument that FDA's general authority under the FDCA preempts state-law unfair competition and false advertising claims); *In re Tylenol (Acetaminophen) Mktg.*, 2015 WL 7076012, at *7–9 (E.D. Pa. Nov. 13, 2015) (in case concerning an over-the-counter drug, holding that the FDCA does not expressly or impliedly preempt claims for "fraud and fraudulent concealment [that] center on the information disclosed to consumers and physicians"); *Crozier v. Johnson & Johnson Consumer Cos*., 901 F. Supp. 2d 494, 505 (D.N.J. 2012) (stating that "even though Plaintiffs' labeling claims [concerning

an over-the-counter drug] are preempted, Defendant has not established that federal law preempts Plaintiffs' marketing claims").[1]

Reaching a contrary conclusion, the Superior Court relied solely on *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312 (S.D. Fla. 2017). In *Phelps*, the plaintiff's allegations largely centered on false or misleading *labeling*, and the court's decision therefore focused on express preemption. *See id.* at 1316–18. The conclusion that the FMIA and PPIA expressly preempt state-law challenges to a meat producer's approved labeling, however, provides no support for the Superior Court's finding of *implied* conflict preemption. Although *Phelps* also holds that

[1] Similarly, the United States Supreme Court in *POM Wonderful LLC*, 573 U.S. 102, held that food and beverage manufacturers may be held liable under the federal Lanham Act, which allows a company to challenge misleading labeling of a competitor, even where the labeling complies with FDA requirements. In that case, Coca-Cola argued that it could not be held liable for misleading labeling and advertising of its juice pomegranate product (which contained exceedingly little pomegranate) because its labeling complied with FDA requirements for juice labeling. The court of appeals had agreed, stating that "for a court to act when the FDA has not—despite regulating extensively in this area—would risk undercutting the FDA's expert judgments and authority." 573 U.S. at 111. Reversing, the Supreme Court explained that federal regulation and the private right of action for misleading marketing practices are complementary. *Id.* at 120–21. Notably, the Court analogized the assertion that the FDA labeling requirements superseded federal Lanham Act advertising claims to the assertion that federal labeling requirements preempted state law, noting that the principles governing preemption were "instructive" to its decision. *Id*. at 112. The Court thus placed substantial reliance on the fact that the FDCA's express preemption provision applicable to food and beverage labeling requirements is limited to state-law *labeling* requirements—that is, requirements that are "of the type" of "certain FDCA provisions with respect to food and beverage labeling." *Id*. at 114.

challenges to advertising statements directed at claims approved by USDA for use in labeling are preempted, it does so only in a short footnote, without analysis. *See id.* at 1317 n.2. Indeed, the one case cited in the footnote, *Kuenzig v. Kraft Foods, Inc*., held that the PPIA and 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. *Kuenzig*, 2011 WL 4031141, at *10 (M.D. Fla. Sept. 12, 2011)). That outcome fully supports ALDF here.

* * *

Although USDA's approval of language for use on a label does not trigger preemption of false advertising claims, that approval may nonetheless be relevant to litigation of those claims. Hormel may argue to the fact-finder that USDA's approval in the context of packaging is evidence in support of its defense on the merits that the language is not false or misleading. ALDF might then seek to present evidence that the language approved by the USDA for labels is false or misleading as used in the challenged advertising. *See Organic Consumers Ass'n*, 284 F. Supp. 3d at 1014 ("Whether a business practice is deceptive is generally a question of fact that requires weighing of evidence from both sides."). Whether ALDF can make that factual showing is a question for the merits stage of the case. Either way, that merits question is irrelevant to the question of preemption—which requires courts to ask only

whether the deceptive advertising claims pose an obstacle to the USDA's labeling authority. As numerous courts have concluded, the answer to that question is no.

CONCLUSION

This Court should reverse the decision of the Superior Court.

Dated: August 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2019, the foregoing Brief of Amicus Curiae Public Citizen will be electronically filed via this Court's electronic filing system, which will send a notice of filing to counsel for the parties, as follows:

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Counsel for both appellant and appellee have consented to service by email in lieu of service of hard copies.

August 6, 2019

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