20-55969

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT COHEN,
Plaintiff–Appellant,
v.
CONAGRA BRANDS, INC.,
Defendant–Appellee.

On Appeal from the United States District Court
for the Central District of California
(Hon. David O. Carter)
№ 20-cv-637

Brief of *Amici Curiae* Consumer Brands Association, North American Meat Institute, National Turkey Federation, National Chicken Council, National Pork Producers Council, American Association of Meat Processors, and American Frozen Food Institute in Support of Appellee & Affirmance

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Corporate Disclosure Statement

No amici entity (the Consumer Brands Association, the North American Meat Institute, the National Turkey Federation, the National Chicken Council, the National Pork Producers Council, the American Association of Meat Processors, and the American Frozen Food Institute) has a corporate parent, is publicly traded, or is more than 10% owned by a publicly traded company. *See* Fed. R. App. P. 26.1(a).

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Identity and Interest of Amici Curiae

Amici are a coalition of trade associations that support, represent, and advocate for the consumer packaged-goods industry, which includes manufacturers, packers, processors, farmers, ranchers, distributors, and sellers of consumer goods including meat and poultry products. Collectively, amici seek to enhance consumer trust in the sectors they represent through smart, uniform regulations.[1]

One way amici do this is by supporting uniform federal standards for product labeling—including the labeling at issue in this case—that strengthen consumer safety and wellness. Such uniformity is vital to their collective ability to satisfy consumers and support the American economy.

The **Consumer Brands Association** champions the industry whose products Americans depend on every day, representing more than 1,700 iconic brands. From household and personal care to food and beverage products, the consumer packaged-goods industry plays a vital role in powering the U.S. economy, contributing $2 trillion to U.S. gross domestic product and supporting more than 20 million American jobs. Consumer Brands is a passionate champion of modern, agile regulatory systems that maintain affordability, promote choice, and build consumer trust. Con-

[1] The parties have kindly consented to the filing of this amicus brief. Fed. R. App. P. 29(a)(2); 9th Cir. R. 29-3.

sumer Brands' advocacy includes amicus briefs in important cases like this one.

The **North American Meat Institute** (NAMI) is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products, and its member companies account for more than 95% of the United States' output of these products. NAMI provides regulatory, scientific, legislative, public relations, and educational services to the meat and poultry packing and processing industry.

The **National Turkey Federation** is the national advocate for America's turkey farmers and producers, raising awareness for its members' products while strengthening their ability to profitably and safely deliver wholesome, high-quality, and nutritious food to consumers worldwide.

The **National Chicken Council** is the national trade association representing the vertically integrated companies that produce and process more than 95% of the chicken marketed in the United States.

The **National Pork Producers Council** (NPPC) is a 501(c)(5) nonprofit agricultural organization representing 42 affiliated state associations serving as the global voice of the U.S. pork industry. NPPC works to ensure that the U.S. pork industry remains a consistent and responsible supplier of high-quality pork to domestic and international markets.

Through public-policy outreach, the organization fights for reasonable legislation and regulations, develops revenue and market opportunities, and protects the livelihood of America's 60,000 pork producers.

The **American Association of Meat Processors** (AAMP) is an international organization whose members include meat and poultry processors, slaughterers, caterers, food-service companies, wholesalers, retailers, suppliers, and consultants to the meat and poultry industry. AAMP is America's largest meat trade association, representing 1,400 establishments. There are 29 state, regional, and provincial associations of meat processors that are also affiliated with AAMP. The majority of its members are small and very small businesses—most being family-owned and operated. As a national meat trade association, AAMP is proud to have members who own businesses of all sizes, but the "backbone" of the organization remains the small and very small independently owned firms across the United States. The mission of AAMP is to provide its members with the regulatory, scientific, and production support they need to allow them to provide their customers with safe and wholesome products.

The **American Frozen Food Institute** (AFFI) is the member-driven national trade association representing all segments of the frozen-food supply chain from manufacturers to suppliers and distributors. AFFI advocates before legislative and regulatory entities on the industry's behalf,

serves as the voice for the industry, and convenes industry leadership to create an environment where frozen foods are essential in a dynamic marketplace.

Amici submit this brief supporting affirmance of the district court's decision. Plaintiff–Appellant Robert Cohen's labeling claims are expressly preempted by the Poultry Products Inspection Act and the Federal Meat Inspection Act, and for purposes of preemption, there is "no reason to distinguish between the packaging itself and an image of the packaging viewed over the Internet."(ER-7). This common-sense ruling rightly recognizes that states may not add their own unique labeling requirements to products already regulated and approved under the PPIA and FMIA, regardless of whether the product appears in a physical store, an online store, or a print circular.

Statement of Participation and Funding

No party's counsel authored this brief in whole or part. No party, and no party's counsel, contributed money that was intended to fund preparing or submitting this brief. No one other than amici, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

Summary of the Argument

It is beyond reasonable debate that Mr. Cohen's package-labeling claims are expressly preempted by the Poultry Products Inspection Act (PPIA) and the Federal Meat Inspection Act (FMIA). Numerous cases so hold, and amici will not belabor that issue. *See, e.g.*, *Brower v. Campbell Soup Co.*, 243 F. Supp. 3d 1124, 1129 (S.D. Cal. 2017). *See also* Conagra Br. at 22–23.[2]

The deeper issue, the one for which Cohen enlisted three special-interest groups as amici, is whether he may, under the law of a single state, demand alterations to a federally approved label just because the federally approved label appears on a product webpage or newspaper circular.

The answer is no for two reasons. One, what Cohen challenges is not advertising, but the mere display of federally approved labeling content in a point-of-purchase context. For decades, information accompanying meat and poultry products at the point-of-purchase has been regulated by the United States Department of Agriculture through its Food Safety and Inspection Service, the agency that approved the labels here. A plaintiff may

[2] As the parties have noted, the PPIA and the FMIA share substantially identical preemption clauses, so amici will refer exclusively to the PPIA in this brief. *Compare* 21 U.S.C. § 467e (PPIA) *with* 21 U.S.C. § 678 (FMIA). *See also Assoc. des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140, 1152 (9th Cir. 2017) (referring to the two preemption clauses as "parallel").

not erode FSIS's labeling role in this context—and confuse national labeling standards in the process—by calling the labeling "advertising."

And two, even in the context of so-called advertising, when the advertising merely parrots federally approved labeling, a plaintiff cannot use state law to overrule that federal approval and demand changes to statements that a federal agency has found not to be false or misleading.

The Court should therefore affirm the district court's ruling. Accepting Cohen's argument would do more than introduce legal error in an isolated case—it would trigger uncertainty in various food-manufacturing sectors and alter the legal landscape of the broader consumer packaged-goods industry, where businesses rely on regulatory certainty and national standards ensure consistent levels of consumer transparency.

Argument

A. Cohen aims his "advertising" argument at a strawman—merely displaying a product on a product webpage or circular is not advertising, and labeling claims in this context are expressly preempted when they seek to alter federally approved labeling.

The initial flaw in Cohen's theory is to treat the appearance of a product label on a website or coupon as "advertising," and therefore beyond the preemptive reach of the PPIA and FMIA. This misapprehends the context

in which the labels here appear, and ignores FSIS's traditional regulatory role in this sphere.

1. Today's consumers view and purchase meat and poultry products in a variety of contexts, including online.

There was a time when a consumer's primary interaction with a food product—at least in the purchasing context—was in the aisle of a glass-door grocery store. That is rapidly changing. Even before the COVID-19 pandemic, online grocery shopping was on the rise. In April 2019, for example, Secretary of Agriculture Sonny Perdue announced a pilot program allowing Supplemental Nutrition Assistance Program (SNAP) participants to purchase groceries online.[3] Part of the impetus for the program was that more and more Americans were ordering and paying for groceries online, and that those receiving SNAP benefits should have the opportunity to do the same.[4]

The COVID-19 pandemic, though, has created what many think will be lasting changes in online grocery shopping. A December 2020 Forbes article reported that during the pandemic, nearly 79% of shoppers have ordered groceries online, and that online U.S. grocery sales jumped from

[3] Food and Nutritional Service, United States Department of Agriculture, "USDA Launches SNAP Online Purchasing Pilot, *USDA* (Apr. 18, 2019), https://bit.ly/3aQmA9V (last visited Feb. 24, 2021).

[4] *Id.*

$1.2 billion in August 2019 to $7.2 billion in June 2020.[5] During the same time, the number of online customers nearly tripled, from 16.1 million to 45.6 million.[6] A key part of this trend is grocery-store apps allowing consumers to order groceries (and even arrange delivery) through their mobile devices. Use of these apps was steadily increasing before the pandemic, and continues to rise.[7] One article reports, for example, that "[f]or the first time, the giant grocery chain Kroger is expected to crack the top 10 list of largest online retailers in the US by the end of 2020, according to eMarketer estimates."[8]

Nor is the trend confined to grocery products. United States e-commerce sales in general jumped more than 30% between the first two

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[5] Blake Morgan, "3 Lasting Changes To Grocery Shopping After Covid-19," *Forbes* (Dec. 14, 2020), https://bit.ly/3pM923H (last visited Feb. 24, 2021).

[6] *Id.*

[7] Lana Bandoim, "Grocery App Usage Will Grow By 50%: What This Means For The Industry," *Forbes* (Sept. 11, 2018), https://bit.ly/2NAnTkC (last visited Feb. 24, 2021); Sarah Perez, "Grocery delivery apps see record downloads amid coronavirus outbreak," *TechCrunch* (Mar. 16, 2020), https://tcrn.ch/3pPD2eZ (last visited Feb. 24, 2021).

[8] Jason Del Rey, "The year shopping changed forever," *Vox* (Dec. 29, 2020), https://bit.ly/2NuwGVk (last visited Feb. 24, 2021).

quarters of 2020.[9] Toward the end of 2020, e-commerce sales were expected to grow more than 30% year over year compared to 2019.[10]

2. *The online product pages that Cohen targets as "advertising" are part of this online-shopping trend.*

The Conagra webpages that Cohen challenges as "advertising" are part of this trend. His lead example is a product webpage for chicken breast strips containing a product description, a "smartlabel®," and a "BUY NOW" button. (ER-213). Cohen's account of how a consumer reaches this webpage elucidates the context: "consumers can click on the desired product, such as the Chicken Breast Strips, that will bring them to the product description, reproduced here." (ER-212). And indeed, clicking on the Conagra website link in Cohen's complaint takes you to a webpage listing a host of chicken products, each with a "BUY NOW" button. (ER-205 n.2). (Clicking the "BUY NOW" button directs the consumer to a third-party online store and also provides a list of local retail stores that carry the product.) What Cohen is challenging, in essence, is the label of a product on an online shelf. Whether the shelf is on the supplier's webpage (such as

[9] Annie Palmer, "Coronavirus pandemic turbocharges online sales, which were up more than 31% in just three months," *CNBC* (Aug. 18, 2020), https://cnb.cx/2ZPmhpH (last visited Feb. 24, 2021).

[10] Jason Del Rey, "The year shopping changed forever," *Vox* (Dec. 29, 2020), https://bit.ly/2NuwGVk (last visited Feb. 24, 2021).

Conagra's) or a grocery store's shopping app, the target of the claim is the same.

3. Information surrounding meat and poultry products at the point of purchase is regulated by the USDA as labeling and therefore falls within the express preemption provisions of the PPIA and FMIA.

Pausing even for a moment to consider this context exposes the flaw in Cohen and his amici's approach to avoiding preemption. Their chief argument, echoing *Sanderson Farms, Inc. v. Tyson Foods, Inc*, is that the Federal Trade Commission, not USDA, is responsible for regulating poultry-product advertising. 549 F. Supp. 2d 708, 716 (D. Md. 2008); Opening Amicus Br. at 10, 20–21.

Notice, though, that they do not tether this argument to any formal definition of "advertising." (*Sanderson Farms* merely nodded at a caselaw definition from the Lanham Act context. 549 F. Supp. 2d at 717 (citing *Applied Med. Res. Corp v. Steuer*, 527 F. Supp. 2d 489, 493 (E.D. Va. 2007)).) The FTC Act, for its part, expressly excludes labeling from the definition of "false advertisement." 15 U.S.C. § 55(a)(1).[11] Given these constraints, Cohen and his amici rest their argument on softer ground: the

[11] Cohen's amici acknowledge that the FTC "generally choos[es] not to pursue actions for false or misleading advertising of products subject to the FDA or USDA label approval process." Opening Amicus Br. at 21.

FTC and USDA's views of their own jurisdiction. *See* Opening Amicus Br. at 20–21 (citing policy manuals and a memorandum of understanding).

Yet they ignore a crucial fact. For nearly 30 years, FSIS has exercised jurisdiction over point-of-purchase materials—including pamphlets, brochures, and posters—that go beyond the label on the physical product:

> When printed and/or graphic informational materials (e.g., pamphlets, brochures, posters, etc.) accompany or are applied to products or any of their containers or wrappers at the point of purchase, *such materials and the claims that they bear are deemed labeling and they are subject to the provisions of the Federal Meat Inspection Act and the Poultry Products Inspection Act*."[12]

Nor is FSIS pulling this authority out of the air. It's rooted in what FSIS calls the "broad" definition of "labeling" under the PPIA.[13] That definition sweeps in

> all 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) (emphasis added).

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[12] FSIS Policy Memo 114A, Aug. 18, 1994 (available at https://bit.ly/2OoQboo) (emphasis added). *See also* FSIS, Food Standards and Labeling Policy Book (2005) at "Point of Purchase Materials" (available at https://bit.ly/3aR571m).

[13] FSIS, *A Guide to Federal Food Labeling Requirements for Meat, Poultry, and Egg Products* at 4–5, Aug. 2007 (available at https://bit.ly/3pQM5fE).

This definition, says FSIS, "makes FSIS regulations applicable to product labels and materials that accompany a product but are not attached to it, such as point-of purchase (POP) materials."[14] The upshot is that "FSIS labeling authority is very broad, extending from the labels appearing on the food package, before they are applied to the product, to point-of-purchase materials, including promotional brochures and shelf-talkers."[15]

The point-of-purchase arena over which FSIS claims regulatory authority would logically include the online point-of-purchase product descriptions that Cohen challenges here as "advertising." FSIS said so in a 2012 Q&A with the American Association of Meat Processors (an amicus here):

> AAMP: In the instances when major cuts of single-ingredient meat and poultry products are purchased via online sales, what are the acceptable methods to provide point-of-purchase nutritional labeling information to customers?
>
> FSIS: For online sales, point-of-purchase nutrition information *available on the same website where the products are ordered from would be acceptable*.[16]

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[14] *Id.* at 5.

[15] *Id.* at 14.

[16] American Association of Meat Processors, *Q & A with AskFSIS on New Nutritional Labeling of Single-Ingredient Products Regulation*, Feb. 16, 2012 (available at https://bit.ly/3bzhGgS) (emphasis added).

All this is significant because it strikes at the heart of what the PPIA means by "labeling," and thus what is expressly preempted by the Act:

> Marking, *labeling*, packaging, or ingredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) 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 official establishment in accordance with the requirements under this chapter....

21 U.S.C. § 467e (emphasis added).

This is why even *Sanderson Farms*—Cohen's hip-pocket advertising case—recognized that "[p]oint-of-purchase materials that merely restate the language approved for the label cannot fairly be characterized as advertising." *Sanderson Farms*, 549 F. Supp. 2d at 717.

As Justice Holmes said, "[w]e must think things, not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true." Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 460 (1889). Notwithstanding the legal bumper sticker he tries to place on it, the product description Cohen challenges is not advertising—it is labeling. And it is protected by the PPIA's express-preemption provision.

B. Even if Cohen were challenging advertising, his claim is still preempted or otherwise fails because the federal agency in charge of labeling has found the challenged labels not to be false or misleading.

The other problem with Cohen's position is that treating federally approved content as "advertising" still does not allow his claims to proceed. This is apparent from the advertising cases he and his amici cite, as well as those they ignore. It is also apparent from their underlying theory of advertising liability.

1. The two advertising cases cited by Cohen and his amici are factually incompatible with the theory of liability attempted here.

Cohen and his amici lean heavily two trial-court cases allowing state-law advertising claims to escape preemption under the PPIA and FMIA. Both those cases are incompatible with the facts of Cohen's case.

The first is *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 549 F. Supp. 2d 708 (D. Md. 2008). It involved a challenge to statements about antibiotics that were used in national advertising "by means of television commercials, radio spots, print ads, billboards, posters, and other media." *Id.* at 710. The court's refusal to treat these advertisements as labeling was based on the fact that the media content went beyond the labeling by including "additional images and promotional slogans." *Id.* at 717, 720. The court referred to this as "non-label advertising," and observed that federal-

ly approved label statements "can be manipulated in an advertisement to create a message that is false and misleading to the consumer." *Id.* at 720.

That rationale finds no purchase here. Cohen does not allege that the webpage and circulars he saw varied from or manipulated the content approved by FSIS. *Sanderson Farms*' "non-label advertising" theory therefore does not help him.

Cohen and his amici also hang their hat on *Organic Consumers Association v. Sanderson Farms, Inc.* 284 F. Supp. 3d 1005 (N.D. Cal. 2018). But it too involved more than replicated label information. It involved online videos and a television ad in which "Bob" and "Dale" made various comments about the products. *Id.* at 1009. Echoing the 2008 *Sanderson Farms* case, the court stood its decision on the fact that "Sanderson's advertising includes images, representations, and language *that go beyond what is included on the USDA approved label*." *Id.* at 1014 (emphasis added).

To be clear, these cases reach the wrong result about preemption of so-called "non-label advertising." But this appeal is not a referendum on *Sanderson Farms* and *Organic Consumers Association*, and the Court should avoid wading into that stream. It is enough that these two cases do not support what Cohen is trying to do. They were adjudicating factually different claims, such that their rationale, wrong as it is, does not touch this case. (And, as amici noted above in Section A.3, *Sanderson Farms* ac-

tually supports amici's position that what Cohen challenges is not advertising for preemption purposes.)

2. *The advertising cases ignored by Cohen and his amici say a lot more about this appeal than the ones they cite.*

On the other hand, four cases ignored by Cohen and his amici explain why his claims do not succeed.

Closest to home is probably *Animal Legal Defense Fund v. Hormel Foods Group*, in which one of Cohen's amici lost the same argument he presses in this case. No. 2016 CA 004744 B, 2019 D.C. Super. LEXIS 7 (D.C. Super. Ct. Apr. 8, 2019) (currently on appeal). The question there was whether a state can "prohibit a meat producer from using in its advertising the same terms in the same way that USDA has determined are not misleading in labeling?" 2019 D.C. Super. LEXIS 7, at *33. The court answered no: "[t]o the extent that a meat producer uses in advertising the same terms with the same disclaimers that USDA has approved in labeling, state-law challenges to the advertising claims are preempted." *Id.*

To conclude otherwise, said the court, would produce two unacceptable results. On the industry side, there would be a clear conflict between what state law deems misleading and what federal law has declared not to be misleading. *Id.* And on the consumer side, "[i]t would be inherently and inevitably confusing to consumers if the description of Hormel's

products in its advertisements were materially different from the description in its labels." *Id.* at *34.

Other cases avoided by Cohen and his amici agree. In *Thornton v. Tyson Foods,* the court rejected an advertising claim where the advertising consisted of a picture of USDA-approved labeling. 482 F. Supp. 3d 1147, ___, 2020 WL 5076083, at *6 (D.N.M. 2020) (currently on appeal). The court reasoned that the USDA had concluded the labels were not misleading or false, and that allowing this claim would undermine Congress's intent to create uniform standards for describing meat products. *Id.*

In *Phelps v. Hormel Foods*, the court held that while the PPIA and FMIA do not expressly preempt all claims attacking "*non-label* advertising," the claims in that case were preempted because "the only advertising content to which Plaintiff objects in the Complaint is use of the terms 'Natural' and 'No Preservatives,' which are claims approved by FSIS for use in describing the Products." 244 F. Supp. 3d 1312, 1317 n.2 (S.D. Fla. 2017).

Finally, in *Kuenzig v. Kraft Foods,* the court held that because the challenged labels complied with federal regulations and had been approved by FSIS, "the labels are presumptively lawful and not false or misleading," and the advertisements were not actionable when they "consist[] solely of Kraft's inclusion of pictures of their lunch meat labels." No. 8:11-cv-838,

2011 WL 4031141, at *7 (M.D. Fla. Sept. 12, 2011); 2012 WL 366916, at *2 (M.D. Fla. Feb. 3, 2012). According to the court, plaintiffs were "simply attempting to challenge Kraft's labels indirectly through its advertising." 2012 WL 366916 at *3. The Eleventh Circuit affirmed the district court's "thorough and well-reasoned orders." 505 F. App'x 937, 939 (11th Cir. 2013).

These cases indicate that dismissal is appropriate when the challenged advertising is merely a replication of federally approved label content.

3. Cohen's amici's rationale for using state law to police FSIS-approved labels appearing in digital or print advertising starts with an incorrect premise.

Cohen's amici attempt to build a policy argument based on the contention that misleading information seen in advertising might not be cured by in-store disclosures, and that, "[c]onversly, viewing labels with inaccurate information about a product can make consumers more likely to believe marketing or advertising information that reinforces inaccurate label information." Opening Amicus Br. at 18–19.

The problem with this argument is that it assumes the fact in dispute: that the labels are misleading. (Amici sometimes use the looser term "inaccurate."). That contention, though, is legally off-limits. As the above cases recognize, FSIS approval signifies that the challenged labels have been found not to be false or misleading. This means that Cohen and his amici

cannot declare them false or misleading under federal law, and, under the PPIA's express-preemption clause, they cannot use state-law to do so. And that is the way Congress designed it. Federal preemption in this context helps ensure consistent, non-misleading labeling whether a consumer is ordering online or buying in-store.

In any event, because the premise of this policy argument is off-limits, the argument is a nonstarter. Cohen's amici may be dissatisfied with the federal decision to approve the labels in this case, but that is a policy decision this Court is not called to second guess.

Conclusion

The district court was right. Plaintiff's package-labeling claim is expressly preempted by the PPIA and FMIA. And his advertising claim, which challenges the same federally approved information appearing on the package label, fails as well. This Court should leave in place Congress's unified national labeling standards to avoid chaos in the industry and confusion to consumers.

Respectfully submitted,

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Certificate of Service

Undersigned counsel for Amici certifies that on February 24, 2021, he electronically filed this Amicus Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will send notification to all counsel of record in this matter.

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UNITED STATES COURT OF APPEALS
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